## TABLE OF CONTENTS


| | PAGE |
|---|---|
| Opinions below | 2 |
| Jurisdiction | 2 |
| Statutes involved | 3 |
| Questions presented | 4 |
| Statement of the case | 5 |
| The questions are substantial | 7 |
| I. A misalignment of rates, relative transportation services considered, is an essential element of undue preference and prejudice under section 3(1) of the Act and the lack of a finding to that effect invalidates the order | 8 |
| II. The District Court erred in holding that prior orders of the Commission requiring equalization of export rates on grain to Corpus Christi, Galveston, and Houston provide a rational basis for the order requiring equalization of the export rates on cotton to those ports | 16 |
| III. The Commission departed from statutory standards to advance a general policy of port equalization which is contrary to section 3(1) of the Act | 18 |
| IV. The District Court erred in sustaining the order on grounds not relied on by the Commission | 21 |
| Conclusion | 26 |
| Appendix A—Opinion of the District Court | App. 1 |
| Appendix B—Judgment of the District Court | App. 11 |
| Appendix C—Report and order of the Interstate Commerce Commission | App. 13 |
| Appendix D—Statement showing relative levels of rates on export cotton | App. 29 |

# CITATIONS

## Cases

PAGE

Alabama State Docks Dept. v. Alabama T. & N. R. Co., 323 I.C.C. 185 (1964) ..... 20

Apples and Pears from Oregon and Washington, 181 I.C.C. 579 (1932) ..... 12

Atchison, Topeka and Santa Fe Railway Co. v. United States, 218 F.Supp. 359 (N.D. Ill. 1963) ..... 6, 10

Baltimore & O. R. Co. v. Boston & M. R. Co., 373 U.S. 372 (1963) ..... 3, 7, 15, 21

Baltimore & Ohio Railroad Company v. United States, 151 F. Supp. 258 (D. Md., 1957) ..... 7

Boston and Maine Railroad v. United States, 202 F. Supp. 830 (D. Mass., 1962) ..... 7, 15, 21

Brazos River Harbor Nav. Dist. v. Abilene & S. Ry. Co., 319 I.C.C. 54 (1963) ..... 20

Burlington Truck Lines v. United States, 371 U.S. 156 1962 ..... 3, 22

California Cold Storage & Distr. Co. v. A., T. & S.F. Ry. Co., 284 I.C.C. 326 (1952) ..... 12

Chamber of Commerce of N.Y. v. N.Y.C. & H.R.R.R. Co., 24 I.C.C. 55 (1912) ..... 13, 18

City of Wilmington v. Alabama G.S.R. Co., 316 I.C.C. 709 (1962); 319 I.C.C. 620 (1963) ..... 15, 19

Cudahy Packing Co. v. Akron, C. & Y. R. Co., 318 I.C.C. 229 (1962) ..... 6

Erie R. Co. v. United States, 59 F. Supp. 748 (S.D. Ohio, 1944) ..... 17

Export Grain from Texas to Texas Points, 319 I.C.C. 16 (1963) ..... 16

Federal Trade Comm'n v. Colgate-Palmolive Co., 380 U.S. 374 (1965) ..... 14

PAGE

Grain From Groups I and J Origins to Pacific Coast, 299 I.C.C. 129 (1956) ..... 11, 12

Grand Rapids Gypsum Co. v. Ann Arbor R. Co., 321 I.C.C. 293 (1963) ..... 12

International Minerals & Metals Corp. v. Southern Pac. Co., 279 I.C.C. 617 (1950) ..... 12

Interstate Commerce Comm'n v. Baltimore & O. R. Co., 355 U.S. 175 (1957) ..... 7

Interstate Commerce Comm'n v. Diffenbaugh, 222 U.S. 42 (1911) ..... 8, 9, 18

Interstate Commerce Comm'n v. New York Central R. Co., 342 U.S. 890 (1951) ..... 7

Labor Board v. Metropolitan Ins. Co., 380 U.S. 438 (1965) 22

Magnet Cove Barium Corp. v. Chicago, B. & Q. R. Co., 315 I.C.C. 555 (1962) ..... 12

Maritime Asso., Boston Chamber of Commerce v. A.A.R.R. Co., 95 I.C.C. 539 (1925) ..... 13, 18

Mechling Barge Lines v. United States, 376 U.S. 375 (1964) 3

New York v. United States, 331 U.S. 284 (1947) ..... 21

New York Central Railroad Co. v. United States, 207 F. Supp. 483 (S.D. N.Y., 1962) ..... 7

New York Central R. Co. v. United States, 99 F.Supp. 394 (D. Mass., 1951) ..... 7

New York Produce Exchange v. Baltimore & O. R. Co., 7 I.C. Rep. 612 (1898) ..... 12, 18

Nueces County Nav. Dist. v. Abilene & S. Ry. Co., 155 I.C.C. 712 (1929) ..... 13, 18

Nueces County Nav. District No. 1 v. Abilene & S. Ry. Co., 291 I.C.C. 459 (1954) ..... 16, 17

Nueces County Nav. Dist. No. 1 v. Atchison, T. & S.F. Ry. Co., 315 I.C.C. 155 (1961) ..... 16

PAGE

Paper From the South and Southwest, 218 I.C.C. 202 (1936) 11

Secretary of Agriculture v. United States, 347 U.S. 645 (1954) ..... 13, 17

Securities & Exchange Comm'n v. Chenery Corp., 318 U.S. 80 (1943); 332 U.S. 194 ..... 21

Stanislaus County v. Atchison, T. & S.F. Ry. Co., 329 I.C.C. 40 (1966) ..... 7, 12

Texas & Pacific Ry. Co. v. United States, 289 U.S. 627 (1933) 20

United States v. Illinois Central R.R., 263 U.S. 515 (1924) ..... 8, 9, 18

Statutes

Act of August 12, 1935, c. 509, 49 Stat. 607 ..... 19

Administrative Procedure Act:

Sec. 8(b), 5 U.S.C., sec. 1007(b) ..... 3

Sec. 10(e), 5 U.S.C., sec. 1009(e) ..... 3

Interstate Commerce Act:

Sec. 3(1), 49 U.S.C., sec. 3(1) ..... 3

Miscellaneous

Brief for the United States, Interstate Commerce Commission and Secretary of Agriculture, United States District Court for the Southern District of Texas, Houston Division, No. 65-H-594, City of Galveston, et al. v. United States, et al. ..19, 20

Sharfman, The Interstate Commerce Commission (1936), vol. III-B ..... 10

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

No.

**CITY OF GALVESTON AND THE BOARD OF TRUSTEES OF THE GALVESTON WHARVES, HOUSTON PORT BUREAU, INC., HARRIS COUNTY-HOUSTON SHIP CHANNEL NAVIGATION DISTRICT, ET AL.,**
*Appellants,*

v.

**UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, NUECES COUNTY NAVIGATION DISTRICT NO 1, ET AL.,**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

## JURISDICTIONAL STATEMENT

Appellants, City of Galveston and the Board of Trustees of the Galveston Wharves; Houston Port Bureau, Inc.;

Harris County-Houston Ship Channel Navigation District; Galveston Cotton Exchange and Board of Trade; Gulf Atlantic Warehouse Co.; and Manchester Terminal Corporation, plaintiffs in the court below, submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that the questions presented by the appeal are substantial.

## OPINIONS BELOW

The opinion of the three-judge United States District Court for the Southern District of Texas, Houston Division, filed August 11, 1966, is reported at 257 F. Supp. 243, and is set forth as Appendix A hereto. (App., pp. 1-10) The judgment of the District Court dismissing the complaint is set forth as Appendix B hereto. (App., pp. 11-12) The report of the Interstate Commerce Commission is reported at 325 I.C.C. 400 and is reproduced as Appendix C hereto. (App., pp. 13-27) A copy of the Commission's order sought to be set aside appears within the Commission's report, 325 I.C.C. at 410. (App., p. 25)

## JURISDICTION

This action was brought by appellants herein pursuant to the provisions of 28 U.S.C. sections 1336, 1398, 2284, and 2321-2325, inclusive, and 5 U.S.C. section 1009, to enjoin, set aside, annul, and suspend an order of the Interstate Commerce Commission, entered May 7, 1965, in the Commission's Docket No. 34409, *Nueces County Navigation District No. 1* v. *Atchison, Topeka and Santa Fe Railway Company, et al.*, The judgment of the District Court dismissing the complaint was filed August 11, 1966. Notice of appeal was filed by the appellants herein in the United States District Court for the Southern District of Texas on October 7, 1966.

Jurisdiction of the Supreme Court to review the judgment of the three-judge district court by direct appeal is conferred by 28 U.S.C. sections 1253 and 2101(b). Such jurisdiction is sustained by a large number of cases, including *Baltimore & O. R. Co.* v. *Boston & M. R. Co.*, 373 U.S. 372 (1963); *Burlington Truck Lines* v. *United States*, 371 U.S. 156 (1962); *Mechling Barge Lines* v. *United States*, 376 U.S. 375 (1964).

## STATUTES INVOLVED

Section 3(1) of the Interstate Commerce Act, 49 U.S.C. section 3(1):

> It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, . . . locality, port, port district, . . . in any respect whatsoever; or to subject any particular person, . . . locality, port, port district, . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . .

Section 8(b) of the Administrative Procedure Act, 5 U.S.C. section 1007(b):

> All decisions . . . shall . . . include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; . . .

Section 10(e) of said Act, 5 U.S.C. section 1009(e):

> So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, . . . It shall . . . (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (3) in excess of statutory jurisdiction, authority, or limitation, . . . (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 . . .

## QUESTIONS PRESENTED

The Interstate Commerce Commission, acting on a complaint filed by the port of Corpus Christi, Tex., ordered that the rail rates on export cotton to Corpus Christi from origins in northern Texas, eastern New Mexico, and Oklahoma be equalized with the rates to Houston and Galveston, Tex., although the rail distances to Corpus Christi substantially exceed those to Houston and Galveston. In an action brought by appellants to set aside and annul the order, the three-judge District Court sustained the order and dismissed the complaint.

The following questions are presented by this appeal:

1. Whether a misalignment of rates, relative transportation services considered, is an essential element of undue preference and prejudice under section 3(1) of the Interstate Commerce Act.

2. Whether the District Court erred by failing to make a distinction between what rail carriers may lawfully do voluntarily to meet competition and what the Commission may compel them to do.

3. Whether prior orders of the Commission requiring equalization of rates on export grain to the involved ports provide a rational basis for the order requiring equalization of the rates on export cotton.

4. Whether the Commission departed from statutory standards in order to advance a general policy of port equalization and whether such a policy is consistent with the Act.

5. Whether the District Court erred in sustaining the order on grounds not relied on by the Commission.

## STATEMENT OF THE CASE

Upon complaint of the port of Corpus Christi, Division 2 of the Interstate Commerce Commission found, *inter alia*, that the rail rates on export cotton from certain origins in northern Texas, eastern New Mexico, and Oklahoma to Corpus Christi were not unreasonable in violation of section 1 of the Interstate Commerce Act, but found, by a 2-to-1 vote, that such rates were unduly prejudicial to Corpus Christi and unduly preferential of Houston and Galveston in violation of section 3(1) of said Act. Acting solely under section 3(1), the Commission ordered equalization of the rates. Upon denial of petitions for reconsideration filed by the railroads and the port interests of Houston and Galveston, the order became administratively final and appellants brought this action to set it aside. The three-judge court sustained the order and entered judgment dismissing the complaint. This appeal is taken from that judgment.

The Division did not make any finding that there was any misalignment in the assailed rates, relative transportation services considered (i.e. that the differences between the rates to Corpus Christi and those to Houston and Galveston were greater than justified by the differences in the services rendered) nor did it make any findings from which any such misalignment could be inferred. It recognized the greater rail distances to Corpus Christi, finding with respect to the distance relationships involved, (App., pp. 21, 23):

> The origin territory involved in this proceeding is over 800 miles wide, and where higher rates are maintained to Corpus Christi than to Houston and Galves-

> ton, the distance from each origin to Corpus Christi is longer than to the other two ports.
>
> • • •
>
> . . . the docket No. 28300 distances . . . to Corpus Christi exceed those to Houston by from approximately 120 to 160 miles, or from 20 percent on the longer hauls to 60 percent on the shorter hauls.

Despite such differences in distances, the Division held that equalization of the rates should be required. The reasons given for this conclusion were that from origins stated to be "substantially the same" the Commission had previously required equalization of rates on export grain, and that the rates on export cotton "appear to exercise so drastic an influence as to require port equalization." (App., p. 23).

In the appendix to its report (App., pp. 26-27), the Commission set forth the rates and distances from representative shipping points to Corpus Christi, Galveston, and Houston. We have set forth in Appendix D hereto pertinent data from the Commission's appendix, to which we have added the Docket No. 28300 first-class rates, as shown by the record herein, as a recognized common denominator for testing whether rates in issue under section 3(1) are or are not misaligned.[1] (App., pp. 29-30) As Appendix D shows, except from relatively unimportant origins in Oklahoma, Corpus Christi now enjoys a more favorable rate relation on export cotton vis-a-vis Galveston and Houston than its distance relation warrants.

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[1]As an example of the Commission's conventional use of the Docket No. 28300 first-class rates as a test of lawful rate relations under section 3(1), see *Cudahy Packing Co.* v. *Akron, C. & Y. R. Co.*, 318 I.C.C. 229, 245 (1962), order sustained in *Atchison, Topeka and Santa Fe Railway Co.* v. *United States*, 218 F. Supp. 359 (1963).

## THE QUESTIONS ARE SUBSTANTIAL

Port relationship cases have traditionally been among the most important and most complex cases before the Commission. Not only is a vast amount of traffic at stake, for which there is bitter competition, but the decisions in such cases have an impact upon the economic fortunes of a large number of ports, railroads, and shippers. The Commission has had considerable difficulty in formulating orders in such cases which will pass the test of judicial review.[2] Much of the complexity in such cases, however, has been due to the fact that the applicable principles for determining what constitutes undue preference and prejudice have not been adequately spelled out by the Commission and the courts; and it has not been made sufficiently clear that the same principles for determining the existence *vel non* of preference and prejudice which apply in the case of any locality or shipper apply with equal force in port cases.[3]

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[2] *New York Central Railroad Co.* v. *United States,* 207 F. Supp. 483 (S.D. N.Y., 1962); *Boston and Maine Railroad* v. *United States,* 202 F. Supp. 830 (D. Mass., 1962) affirmed by an equally divided Court, *Baltimore & O. R. Co.* v. *Boston & M. R. Co.,* 373 U.S. 372 (1963); *Baltimore & Ohio Railroad Company* v. *United States,* 151 F. Supp. 258 (D. Md., 1957), judgment vacated on appeal on the ground that the District Court's judgment unduly restricted the Commission's consideration on remand, *Interstate Commerce Comm'n* v. *Baltimore & O. R. Co.,* 355 U.S. 175 (1957); *New York Central R. Co.* v. *United States,* 99 F. Supp. 394 (D. Mass., 1951), affirmed *per curiam, Interstate Commerce Comm'n* v. *New York Central R. Co.,* 342 U.S. 890 (1951).

[3] The Commission's difficulties in formulating and following proper principles in section 3(1) cases have not, of course, been confined to port cases, as is well illustrated by its latest report in *Stanislaus County* v. *Atchison, T. & S. F. Ry. Co.,* 329 I.C.C. 40, decided by the entire Commission, August 18, 1966. This was the Commission's

Since the questions here presented go to the essence of what constitutes preference and prejudice and what elements must be established to prove the offense, resolution of such questions will lay down applicable guidelines in all cases under section 3(1) where an allegedly prejudiced shipper, locality, or port seeks to compel changes in existing rates. Thus resolution of such issues is a matter of public importance with respect to the proper administration and interpretation of section 3(1) of the Act.

## I.

### A MISALIGNMENT OF RATES, RELATIVE TRANSPORTATION SERVICES CONSIDERED, IS AN ESSENTIAL ELEMENT OF UNDUE PREFERENCE AND PREJUDICE UNDER SECTION 3(1) OF THE ACT AND THE LACK OF A FINDING TO THAT EFFECT INVALIDATES THE ORDER.

The basic issue presented is whether, as contended by appellants, a misalignment of rates, relative transportation services considered, is an essential element of the undue preference and prejudice which is prohibited by section

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fourth report. Each of its three previous orders (302 I.C.C. 365; 315 I.C.C. 459; 323 I.C.C. 213) was set aside by the courts, either because the Commission failed to apply the proper principles of decision in such cases or because it failed to make necessary findings (193 F. Supp. 145; 236 F. Supp. 146; and a memorandum opinion in the United States District Court for the District of Minnesota, No. 3-65-7 Civil, May 18, 1965). The Commission has vacillated back and forth and, in its latest report, arrived at the conclusion that the Commission "is not empowered to remove disadvantages caused by natural environment," citing in support thereof *United States* v. *Illinois Central R. R.*, 263 U.S. 515, 524, and *Interstate Commerce Comm'n* v. *Diffenbaugh*, 222 U.S. 42, 46. (329 I.C.C. at 53-54) That conclusion was directly contrary to its conclusion in the present case.

3(1) of the Interstate Commerce Act, or whether, as contended by appellees and held by the District Court, such undue preference and prejudice may be established merely by a showing that the allegedly prejudiced port is subjected to higher rates, even though due to longer hauls, and that such port is hurt by the difference in rates.

The District Court's decision proceeds upon a fundamental misconstruction of section 3(1) of the Act. What section 3(1) prohibits is inequity of treatment, not differences in rates. Congress did not prohibit the charging of higher rates where justified by greater service, even though the further distant person or locality might be hurt by such higher rates. Railroads are entitled to charge more for longer hauls than shorter hauls so long as their charges are not unfairly proportioned to the services rendered. Thus, a longer-haul port is not prejudiced by being charged higher rates than competing ports unless the difference in rates is greater than is warranted by the difference in services.

This Court held in *Interstate Commerce Comm'n* v. *Diffenbaugh*, 222 U.S. 42, 46 (1911), that the Interstate Commerce Act "does not attempt to equalize fortune, opportunities, or abilities." And, in *United States* v. *Illinois Central R. R.*, 263 U.S. 515, 524 (1924), this Court said:

> . . . the advantage which comes to a shipper merely as a result of the position of his plant does not constitute an illegal preference. . . . To bring a difference in rates within the prohibition of § 3, it must be shown that the discrimination practiced is unjust when measured by the transportation standard.

Appellants believe those cases mean that charging a higher rate to a longer-haul port than to a shorter-haul port is not an illegal preference of the shorter-haul port

unless the difference in rates is more than is justified by the difference in the services rendered. If that is correct, the Commission is without power to compel equalization of rates for the purpose of neutralizing the advantages and disadvantages of location of such ports.

The necessary corollary of the construction this Court has given section 3(1) is that a misalignment of rates, relative transportation services considered, is an essential element of a section 3(1) violation so that an order compelling equalization cannot stand in the absence of a quasi-jurisdictional finding that there is a misalignment in the existing rates, relative transportation services considered.[4] In the absence of such a misalignment there can be no prejudice in the rates, undue or otherwise. Obviously, there can be no "undue" prejudice in the absence of some prejudice to be undue.[5]

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[4] The District Court concedes that there must be a "showing" of "a rate disparity or 'misalignment of rates,'" citing *Atchison, Topeka and Santa Fe Railway Co.* v. *United States*, 218 F. Supp. 359, 363 (N.D. Ill., 1963), but then it simply equates those terms with a mere "difference" in rates. The District Court either overlooked or disregarded the fact that, in the cited case, no one disputed the existence of a disparity or misalignment of rates, *relative transportation services considered*, which had been established by comparing such rates to the Docket No. 28300 first-class rates, as well as rail costs, as common-denominator tests of the services rendered. (218 F. Supp. at 362) The dispute in the cited case was over the question of "injury," another, but wholly separate, essential element of a showing of undue preference and prejudice.

[5] See Sharfman, *The Interstate Commerce Commission* (1936), vol. III-B, pp. 554-559. Professor Sharfman points out that two separate inquiries are involved in determining what constitutes unlawful preference and prejudice: (1) by what tests is a preferential or prejudicial relationship to be known, and (2) on what grounds

While the Commission has not made this distinction so clearly as did Professor Sharfman, it has recognized that rates which properly reflect differences in distance afford no basis for a finding of undue prejudice against a person or locality with the longer haul. In *Grain From Groups I and J Origins to Pacific Coast*, 299 I.C.C. 129, 134 (1956), the Commission said:

> However, the respondents have shown that the proposed rates are reasonably graded according to short-line distances, and since their proposal would allow the protestants rates which are *relatively no higher* than those afforded other shippers in the area, no basis exists for a finding of prejudice which is undue. (Emphasis added)

And in *Paper From the South and Southwest*, 218 I.C.C. 202, 216 (1936) the Commission said:

> . . . it is difficult to understand how undue prejudice under section 3 can be present where rates are made on precisely the same level, mile for mile, from all competitive producing points to common destinations.

The reason why, in such cases, "no basis exists for a finding of prejudice which is undue" is, of course, because no basis exists for a finding of any prejudice at all. Obviously there is no prejudice against a longer-haul locality if it is ac-

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may such a relationship be deemed free from the prohibitions of the statute? After discussing the relevant considerations, he says (pp. 558-559):

> The test of preference or prejudice does not lie, then, in the elementary circumstance of whether rates are equal or unequal. The equality designed to be produced by equal rates, where unequal transportation services are involved, is the commercial equality of differently situated shippers—a consideration by which the Commission may not legally and should not economically be governed.

corded a level of rates no higher, distance considered, than the shorter-haul competing locality is accorded.[6]

In "non-port" cases, the Commission purports to follow the rule of the *Diffenbaugh* and *Illinois Central* cases that it may not compel a change in rates for the purpose of neutralizing the advantages and disadvantages of location.[7] Furthermore, for many years it followed the same rule in "port" cases. In *New York Produce Exchange* v. *Baltimore & O. R. Co.*, 7 I.C. Rep. 612 (1898), where New York port interests sought to compel equalization of rates on grain and produce to the longer-haul port of New York with rates to the shorter-haul ports of Philadelphia and Baltimore, the Commission, in holding that the assailed rates did not violate section 3(1), said (p. 667):

> Distance is frequently disregarded by carriers in the making of their rates. The Commission has held that it may be under some circumstances properly disregarded to some extent. It has been repeatedly said, however, that distance ought, when possible, to be regarded, and we have never held that a carrier would

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[6] "Distance is the commonly accepted measure of relative transportation service, conditions affecting transportation being substantially the same." *Apples and Pears from Oregon and Washington*, 181 I.C.C. 579, 591 (1932). In the present case, the Commission found that such transportation conditions "are substantially the same." (App., p. 23)

[7] For example, *Stanislaus County* v. *Atchison, T. & S. F. Ry. Co.*, 329 I.C.C. 40, 53-54 (1966); *Grand Rapids Gypsum Co.* v. *Ann Arbor R. Co.*, 321 I.C.C. 293, 296 (1963); *Magnet Cove Barium Corp.* v. *Chicago, B. & Q. R. Co.*, 315 I.C.C. 555, 558 (1962); *Grain From Groups I and J Origins to Pacific Coast*, 299 I.C.C. 129, 136 (1956); *International Minerals & Metals Corp.* v. *Southern Pac. Co.*, 279 I.C.C. 617, 619 (1950); *California Cold Storage & Distr. Co.* v. *A., T.& S.F. Ry. Co.*, 284 I.C.C. 326, 328 (1952).

be compelled to disregard it for the purpose of putting two communities upon a commercial equality.

In accord are *Chamber of Commerce of N. Y.* v. *N.Y.C. & H.R.R.R. Co.*, 24 I.C.C. 55 (1912); *Maritime Asso., Boston Chamber of Commerce* v. *A.A.R.R. Co.*, 95 I.C.C. 539 (1925); *Nueces County Nav. Dist.* v. *Abilene & S. Ry. Co.*, 155 I.C.C. 712 (1929). In the case last cited, the Commission specifically considered whether Corpus Christi was entitled to compel the rail carriers to disregard the differences in distance and equalize the rates on export cotton to Corpus Christi with those to Galveston and Houston. It was there held that, in view of differences in distance almost exactly the same as in the present case, such equalization could not be compelled.[8] (155 I.C.C. at 715-717).

There is nothing in the Commission's report to explain its departure from the rule of the *Diffenbaugh* and *Illinois Central* cases or its own section 3(1) cases, both "port" and "non-port" cases. Cf. *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 653 (1954). Those cases must govern this case and the District Court erred in holding otherwise. The District Court's definition of prejudice (App., p. 6) as "a practical consequence in the practical world of transportation," would leave the determination of what constitutes undue preference and prejudice to the complete and arbitrary discretion of the Commission, and with no standards to be followed in the determination of that issue. We submit that the District Court erred and that the words "undue preference and prejudice" set forth a legal standard which must get its

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[8] The District Court brushed aside that decision (note 8, App., p. 9) with the comment: "Much has happened since then." But there is not a single word in its opinion to indicate what it thought had happened to change the situation. The District Court declined to face up to the fact that what the Commission there considered to be controlling were the differences in distance.

final meaning from judicial construction. Cf. *Federal Trade Comm'n* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965). When this Court holds that the advantage of location is not an illegal preference, and that the Act does not attempt to equalize fortune, opportunities, or abilities, those are legal standards which the Commission must respect. It cannot be allowed to circumvent them on the theory that it has "broad discretion" to determine what is prejudice as a "practical consequence in the practical world of transportation."

In holding (App., pp. 9-10) that the Commission's "ultimate conclusion was well within its 'broad discretion . . . to accommodate the factors of transportation conditions, distance and competition,' " the District Court misconceived the issue and misunderstood the Commission's role in cases of this kind. This was due to its failure to recognize the distinction so well pointed out by Professor Sharfman (note 5, pp. 10-11 *supra*) between the two inquiries: (1) by what tests is a preferential and prejudicial relationship to be known, and (2) on what grounds may such a relationship be deemed free from the prohibitions of the statute. The present case raises an inquiry of the first category: Did the Commission apply the proper test of what is a preferential and prejudicial relation? But the rule applied by the District Court is the one applicable to inquiries of the second category: Where such a preferential and prejudicial relationship exists, is it justified by competition or other transportation conditions?[9] The issue here is not whether port equalization would be lawful but whether the

[9] The importance of such a distinction is well illustrated by the difference between the issues which are raised in cases such as the present one, where a longer-haul port seeks to require changes in existing rates in order to *compel* port equalization in disregard of substantial differences in distances, and cases in which the carriers vol-

*existing* rates are unlawful. Cf. *Boston and Maine Railroad* v. *United States*, 202 F. Supp. at 837. Recognition of that distinction is of the utmost importance and the failure of the District Court to observe it is a fundamental error which caused the District Court to err in the other respects herein pointed out.

We submit, therefore, that whether a misalignment of rates, relative transportation services considered, is an essential element of undue preference and prejudice is a substantial question of public importance.

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untarily seek to disregard substantial differences in distance in order to *voluntarily* equalize competing ports. In the latter type of case, of which *City of Wilmington* v. *Alabama G.S.R. Co.*, 316 I.C.C. 709 (1962), 319 I.C.C. 620 (1963) and *Boston and Maine Railroad* v. *United States*, 202 F. Supp. 830 (1962), affirmed by an equally divided Court, *Baltimore & O.R. Co.* v. *Boston & M.R. Co.*, 373 U.S. 372 (1963) are typical examples, a misalignment of rates is *always* present simply by reason of the fact that the carriers propose to charge equal rates for unequal services. Where there is such a misalignment between competing ports, the tests of prejudice have been thus met, and the inquiry in such cases is *always* whether such prejudice is "undue" within the meaning of the statute. It is in considering this inquiry that the Commission has broad discretion to accommodate the factors of distance, competition, and other transportation conditions, for it is well recognized that not all prejudice is unlawful, but only such prejudice as is "undue." In such a case the lawfulness of existing rates is not in issue; only the lawfulness of the proposed rates is in issue. *Boston and Maine Railroad* v. *United States, supra*, 202 F. Supp. at 837. In cases such as the present one, however, where the lawfulness of existing rates is in issue, the first inquiry must *always* be: Is there any misalignment in the rates? In the absence of an affirmative answer to that inquiry, the other inquiries are never reached. The area of the Commission's broad discretion to accommodate the factors of distance, competition, and other transportation conditions—the area of determining whether prejudice is or is not undue—is not reached until the prejudice itself is established.

## II.

### THE DISTRICT COURT ERRED IN HOLDING THAT PRIOR ORDERS OF THE COMMISSION REQUIRING EQUALIZATION OF EXPORT RATES ON GRAIN TO CORPUS CHRISTI, GALVESTON AND HOUSTON PROVIDE A RATIONAL BASIS FOR THE ORDER REQUIRING EQUALIZATION OF THE EXPORT RATES ON COTTON TO THOSE PORTS.

The Commission based its order here primarily on three previous cases in which it required equalization of rates on export grain and grain products to Corpus Christi with those to Galveston and Houston (App., p. 23).[10] The District Court held (note 6, App., p. 8) that those cases "are cited because of their role as transportation conditions and not as legal authority for the order under consideration"; and that "prior equalization of rates from these origins for other commodities is a relevant transportation condition." (App., p. 9) The District Court's theory that the prior decisions were "relevant transportation conditions" was entirely its own. This theory was not articulated by the Commission.[11]

Even if this novel theory of the District Court were correct, it would not support the order here for the cases cited do not, and cannot, supply the missing finding, which must be based on facts of record here, that there is a misalignment, relative transportation services considered, in the assailed rates on export cotton. In the absence of a finding of such misalignment, neither the Commission nor the Court has any occasion to consider whether a non-existent

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[10] *Nueces County Nav. District No. 1* v. *Abilene & S. Ry. Co.*, 291 I.C.C. 459 (1954); *Nueces County Nav. Dist. No. 1* v. *Atchison, T. & S. F. Ry. Co.*, 315 I.C.C. 155 (1961); *Export Grain from Texas to Texas Points*, 319 I.C.C. 16 (1963).

[11] See pp. 21-25, *infra*.

misalignment would be justified by transportation conditions.

Furthermore, the District Court erred in holding that the prior cases were relevant transportation conditions here. There is nothing in the Commission's report which shows that the transportation circumstances and conditions surrounding the movement of export grain and grain products are in any way similar to those surrounding the movement of export cotton. On the contrary, numerous substantial differences are readily apparent.[12] The adequacy of facts to support the Commission's conclusion must be established by findings based on the record in this case. The Commission cannot rely on its findings in other cases to take the place of essential findings and substantial evidence here. *Secretary of Agriculture* v. *United States,* 347 U.S. 645, 652 (1954); *Erie R. Co.* v. *United States,* 59 F. Supp. 748 (S.D. Ohio, 1944).

Resolution of this question is important to the administration of section 3(1) because it is necessary to ensure that the determination of what constitutes undue prefer-

[12] For example, the origins here involved are in northern Texas, eastern New Mexico, and Oklahoma. In *Nueces County Nav. District No. 1* v. *Abilene & S. Ry. Co.,* 291 I.C.C. 459 (1954), the first of the export grain cases referred to, and the one on which the other two export grain cases were primarily based, the involved origins were in Colorado, Kansas, Missouri, Illinois, Iowa, Nebraska, South Dakota, North Dakota, Minnesota, and Wisconsin. 291 I.C.C. at 459-460. In addition, in that case, as distinguished from the present one, there was extensive voluntary equalization of rates by the railroads to Galveston, Houston, Port Arthur, New Orleans, Mobile, and Pensacola, but Corpus Christi had been excluded from the equalization, although the distances to Corpus Christi were generally comparable to the distances to New Orleans, Pensacola, and Mobile, which enjoyed rate equalization with the other Texas ports. 291 I.C.C. at 463-464.

ence and prejudice among ports will be based on the facts of record and will not be determined as a "policy" question.[13]

## III.

### THE COMMISSION DEPARTED FROM STATUTORY STANDARDS TO ADVANCE A GENERAL POLICY OF PORT EQUALIZATION WHICH IS CONTRARY TO SECTION 3(1) OF THE ACT.

The District Court found (App., p. 5) that the Commission "did not purpose to go outside traditional guidelines or to establish new precedents designed to advance the equalization of all ports." This finding is clearly incorrect. The Commission's order departs from the guidelines laid down by this Court in *Interstate Commerce Comm'n* v. *Diffenbaugh*, 222 U.S. 42 (1911) and *United States* v. *Illinois Central R. R.*, 263 U.S. 515 (1924), from the Commission's own prior decisions in *New York Produce Exchange* v. *Baltimore & O. R. Co.*, 7 I.C. Rep. 612 (1898), *Chamber of Commerce of N.Y.* v. *N.Y.C. & H.R.R. R. Co.*, 24 I.C.C. 55 (1912), *Maritime Asso., Boston Chamber of Commerce*, v. *A.A.R.R. Co.*, 95 I.C.C. 539 (1925), *Nueces County Nav. Dist.* v. *Abilene & S. Ry. Co.*, 155 I.C.C. 712 (1929), and from numerous non-port cases involving the same principles.[14]

The Commission's report does not contain any explanation of why it did not follow such principles here. Since the Commission still purports to follow such principles in "non-port" cases the only reasonably logical explanation of why it did not do so here is because it erroneously believes that the 1935 amendment which added "port" and

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[13] See pp. 18-21.

[14] See note 7, p. 12.

"port district" to section 3(1) of the Act, 49 Stat. 607, somehow changed the rules for determining preference and prejudice among ports and authorizes the Commission to follow a general policy of port equalization.

While the Commission did not specifically refer to such policy here, it has acknowledged the existence of such a policy. In *City of Wilmington* v. *Alabama G.S.R. Co.*, 316 I.C.C. 709, 725 (1962), Division 2 said:

> The general policy of the Commission in cases of this kind has been to permit or require equalization where the geographically handicapped port appeared to be at a serious competitive disadvantage by reason of the rate adjustment, provided that such equalization was confined within reasonable limits determined by the needs of the ports concerned, the carriers serving them, and the shipping public.

The Commission's finding in the present case (App., p. 23) that the assailed rates "appear to exercise so drastic an influence as to require port equalization," and its reliance on the prior grain cases, without any discussion of the facts in those cases, as authority for such equalization clearly indicate that "policy" considerations were what dictated the order here in question. Furthermore, the Commission specifically defended the order in the District Court on the ground that it was in accord with such policy, saying (Gov't Br., p. 25):

> . . . plaintiffs . . . contend that there can be no preference and prejudice if two competing ports are accorded the same *level* of rates, distance considered. If this were so, the historical common practice of requiring rate equalization for competing ports despite differences in distance would be unlawful and would never have occurred. [Citing and quoting from *City of Wilmington, supra,* as being to the contrary.]

*City of Wilmington* was, as we have indicated (note 9, pp. 14-15) a case of an attack by a shorter-haul port on the equalization voluntarily extended by the carriers to a longer-haul port. Whether, or to what extent, the Commission may follow a "policy" of *permitting* port equalization to be maintained in disregard of differences in distance is a question which is not involved here. Here the question is not whether equalization would be lawful, but whether the *existing* rates are unlawful so that equalization may be compelled. *City of Wilmington* has no bearing on that question.

The Commission has suggested that the 1935 amendment was an expression of Congressional policy in favor of port equalization. *E.g., Brazos River Harbor Nav. Dist.* v. *Abilene & S. Ry. Co.*, 319 I.C.C. 54, 65-66 (1963), 322 I.C.C. 529, 534-535 (1964), which decision was also relied on heavily in support of the order in the District Court (Gov't Br., pp. 20-21); and *Alabama State Docks Dept.* v. *Alabama T. & N. R. Co.*, 323 I.C.C. 185, 188-189 (1964). To the contrary, the legislative history of the amendment indicates that its purpose was to restore to ports the forum to complain of undue preference and prejudice which had been denied them by this Court's decision in *Texas & Pacific Ry. Co.* v. *United States*, 289 U.S. 627 (1933) holding that a port was not a "locality" within the meaning of that term as it appeared in section 3(1) as it then read. The legislative history contains no indication that there was to be any change in the guidelines for determining preference and prejudice. In fact, the specific situation which brought forth the amendment was one in which the carriers were attempting to deprive the shorter-haul ports of the benefit of their location by voluntarily equalizing rates to longer-haul ports in disregard of very substantial differences in distance. It was in such a situation that Congress acted to restore to the shorter-haul ports the right to complain of such treatment.

While this Court has never passed on the meaning of the 1935 amendment, it has held that a similar amendment, made in 1940, which added to section 3(1) the words "region, district, territory," "did not introduce a new standard of discrimination" into section 3(1). *New York* v. *United States,* 331 U.S. 284, 300 (1947). And, in *Boston and Maine Railroad* v. *United States,* 202 F. Supp. 830 (D. Mass., 1962), affirmed by this Court by an equally divided vote, *Baltimore & O. R. Co.* v. *Boston & M. R. Co.,* 373 U.S. 372 (1963), it was held (202 F. Supp. at 836) that "Neither the legislative history nor the plain words of the amendment indicate that any change in the prevailing rules respecting preference and prejudice or any special treatment of ports and port districts was intended."

It is important to the administration of section 3(1) that this Court make clear that questions of preference and prejudice among ports are to be decided on the facts of record and not as policy matters; and it is important that this Court make it clear that the 1935 amendment did not change any of the prevailing rules respecting undue preference and prejudice or indicate that any special treatment of ports and port districts was intended.

## IV.

### THE DISTRICT COURT ERRED IN SUSTAINING THE ORDER ON GROUNDS NOT RELIED ON BY THE COMMISSION.

The decisions of this Court make it clear that the validity of the Commission's order must be tested on the grounds on which the Commission itself acted, and that the Commission must articulate those grounds with precision. The reviewing court may neither adopt the *post hoc* rationalization of Commission counsel or supply its own rationale in place of the one articulated by the Commission. *Securities & Exchange Comm'n* v. *Chenery Corp.,* 318 U.S. 80,

94-95 (1943); 332 U.S. 194, 196 (1947); *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168-169 (1962); *Labor Board* v. *Metropolitan Ins. Co.*, 380 U.S. 438, 442-444 (1965).

The rule of law is so clear that, if this question alone were presented, it would not require further argument or plenary consideration, although because of the substantial and obvious error of the District Court, summary reversal of its judgment would be required. The importance of this question lies in the fact that, when the District Court's rationalization of the order is stripped away, it can be seen that the Commission's ultimate conclusion of undue preference and prejudice is an arbitrary pronouncement with no pretense of conformity to the criteria of undue preference or prejudice set forth in the opinions of this Court.

The District Court found that the Commission's findings are "sketchy and present this court with difficulties which more explicit findings would remove" and that the Commission's opinion "is so imprecise in revealing just what findings it is making that the order borders dangerously on running afoul of the requirement that agencies disclose the basis of their orders." (App., pp. 3-4). It also recognized that "the United States, the ICC, and the defendant intervenors have offered new rationales for the ICC order, but whatever their merits, such suggestions could only call for remand to the agency for consideration." (App., p. 4). Having so found, the District Court then, contrary to its own ruling, specifically relied on those "new rationales" as its own reasons why the order should be sustained.

Among the principal reasons given by the District Court for sustaining the order were the following:[15]

[15] Numbers in parentheses added to facilitate identification.

(1) It [Corpus Christi] is geographically and frequently by highway distances closer to this cotton origin territory than Houston-Galveston, . . . . (App., p. 6)

• • •

(2) Corpus Christi now gets practically no cotton from these origins by truck. (App., p. 6)

• • •

(3) The Commission pointed out that the Corpus Christi and Houston-Galveston ports had been equalized on cotton for a number of years before the railroads voluntarily reduced their rates to Houston. (App., pp. 7-8).

• • •

(4) Rail rates for certain other commodities from these origins and others are equalized between the ports, some voluntarily . . . (App., p. 8)

• • •

(5) The short-line route from Lubbock, Texas, the center of the heavy cotton production area, to Corpus Christi is 67 miles farther than to Galveston, which in turn is 45 miles farther than Houston. The railroads have already equalized Galveston and Houston, so the required equalization here is an additional 22 mile difference on a 646 mile haul. (App., p. 9).

• • •

(6) The prior equalization of rates from these origins for other commodities is a relevant transportation condition. (App., p. 9).

Except to the extent that No. 6 above refers to the equalization on grain and grain products ordered by the Commission (referred to in the omitted portion of No. 4 above), a subject discussed at pp. 16-18, *supra*, not a single one

of the foregoing reasons given by the District Court for sustaining the order was given by the Commission as a reason for entering it. They are all "new rationales" offered by counsel for the Government and intervening defendants or supplied by the District Court itself in support of the order. Furthermore, they are in substantial part either factually incorrect or are irrelevant to the issues here, and even if they had been relied on by the Commission, they would not support the order.[16]

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[16] For example, as to No. 1, the Commission's report makes no reference to highway mileages. As to No. 2, the report shows that "during the last 4 years, an average of over 100,000 bales of cotton from the origin area involved herein were exported through Corpus Christi, and during the last 2 years all of this cotton moved by truck." (App., p. 18) As to No. 3, the so-called "equalization"—which is not even referred to in the Commission's report—resulted from the fact that the mileage scales of "any-quantity" rates on cotton then in effect provided a blanket rate to all Texas ports for distances in excess of 210 miles. Such rates were replaced by carload rates in the early 1930's and the "equalization" referred to has not been in effect for more than 30 years. Insofar as Nos. 4 and 6 refer to voluntary equalization on other commodities, they are based on a misunderstanding of the facts, as there is no such equalization and the Commission's report does not say that there is. While the same *scales* of rates apply to Corpus Christi as to Galveston and Houston, the rates are higher to Corpus Christi because of the longer distances. As to No. 5, the Commission gave no such reason for its order although the basic figures do appear in the report in another form. Furthermore, the District Court's rationalization gives the wrong impression. The short-line distance from Lubbock to Corpus Christi exceeds that to Galveston by 67 miles, not 22 miles as the District Court seems to suggest, and exceeds the short-line distance to Houston by 112 miles. But the Docket No. 28300 mileages were the ones on which the Commission relied as fixing the involved distance relationships. The Docket No. 28300 mileage from Lubbock to Corpus Christi is 121 miles greater than to Houston and Galveston, which are in the same class-rate group. (App., p. 22)

It is apparent that the District Court did not properly discharge its duty under the Administrative Procedure Act. It did not analyze the findings made by the Commission to determine if they articulated a rational basis for the order. It simply started from its conclusion that it is wholly within the "broad discretion" of the Commission to decide what is undue preference as "a practical consequence in the practical world of transportation," and then set about to rationalize its conclusion, failing to notice that the reasons it was giving for sustaining the order were not those relied on by the Commission in entering the order, but were the *post hoc* rationalizations of counsel for the Government and the intervening defendants.

Were it not for the fact that the other questions here presented require the plenary consideration of this Court, the judgment of the District Court should be summarily reversed, because of its failure to follow the rule of the *Chenery, Burlington Truck Lines* and *Metropolitan Ins.* cases, with instructions to set the Commission's order aside and remand it to the Commission for further consideration. Under the circumstances, however, that would unduly delay resolution by this Court of the important legal issues here presented relating to the proper interpretation of section 3(1) of the Interstate Commerce Act and the Commission's power thereunder.

## CONCLUSION

For the reasons above set forth, we submit that the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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December 1966

## APPENDIX A

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| CITY OF GALVESTON, ET AL., *Plaintiffs,* | | |
| VS. | | Civil Action |
| UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants.* | | No. 65-H-594 |

Before BROWN, *Circuit Judge,* and HANNAY and INGRAHAM *District Judges.*

INGRAHAM, *District Judge:*

The ports of Houston and Galveston and four of the original twenty-six defendant railroads seek to set aside an order of the Interstate Commerce Commission entered in *Nueces County Navigation District No. 1* v. *Atchison, Topeka and Santa Fe Railway Company, et al.,* 325 I.C.C. 400 (1965). The order held that the export rates for cotton from specified origins in northern Texas, Oklahoma and New Mexico were unduly prejudicial to the port of Corpus Christi and unduly preferential to the ports of Houston and Galveston, in violation of Section 3(1) of the Interstate Commerce Act, 49 U.S.C.A., Section 3(1).[1]

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[1] Section 3(1) of the Interstate Commerce Act, 49 U.S.C.A., Section 3(1):

"It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port

This court concludes that the order is supported by substantial evidence, is consistent with Section 3(1), and meets the requirements of the Administrative Procedure Act, 5 U.S.C.A., Section 1001, *et seq.* This court enforces the order by denying relief and dismissing the cause on its merits.

This court properly performs only a very limited role in reviewing a decision of an administrative body such as the ICC. Once a rational basis for the conclusions of an administrative body is found, the judicial function is ended. *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, 286-7 (1934). Courts are not empowered to weigh the wisdom of a particular decision:

> "It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law." *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 536 (1946).

Courts have long recognized the application of this principle to discriminatory rail rate situations and pointed to the particular considerations which support the rule in this area. Whether a discrimination or preference is undue, unreasonable and unjust is a determination for the

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district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . ."

ICC to make. *Nashville, C. & St. L. Ry.* v. *Tennessee,* 262 U.S. 318, 322 (1923). A court "has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it." *Virginian Ry.* v. *United States,* 272 U.S. 658, 665-6 (1926). Congress has constituted the ICC as the expert body which is informed by experience to determine whether undue discriminations exist in rail rates.

> "The complexities and involvements of railroad rates are not to be shifted from the shoulders of the experts commissioned to handle them to the backs of the judiciary; nor are the broad powers of judgment conferred upon the experts to be unduly hampered." *Koppers Company, Inc.* v. *United States,* 166 F.Supp. 96, 103 (W.D. Pa. 1958).

This court must determine whether the Commission has followed correct legal procedures and principles, but beyond that this court is permitted no greater role than ascertaining whether there exists a rational basis for the ICC order.

> " . . . We would depart from our competence and our limited function in their field if we undertook to accommodate the factors of transportation conditions, distance and competition differently than the Commission has done in this case. This is a task peculiarly for it." *Ayrshire Collieries Corp.* v. *United States,* 335 U.S. 573, 593 (1949).

The ICC findings under review here are sketchy and present this court with difficulties which more explicit findings would remove. The ICC opinion is so imprecise in revealing just what findings it is making that the order

borders dangerously on running afoul of the requirement that agencies disclose the basis of their orders.[2]

However, this court concludes that the findings are adequate under Section 8(b) of the Administrative Procedure Act, 5 U.S.C.A., Section 1007(b). No purpose would be accomplished by returning the case to the ICC for further findings.

The ICC decision here must be tested on the basis of what it contains, and not on any new ideas offered to support it. The United States, the ICC, and the defendant intervenors have offered new rationales for the ICC order, but whatever their merits, such suggestions could only call for remand to the agency for consideration. *S. E. C.* v. *Chenery Corp.*, 318 U.S. 80, 94-5 (1943).

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[2] "Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion.' *New York* v. *United States*, 342 U.S. 882, 884 (dissenting opinion). 'Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body.' *Federal Communications Com.* v. *RCA Communications, Inc.*, 346 U.S. 86, 90. The Commission must exercise its discretion under Sec. 207(a) within the bounds expressed by the standard of 'public convenience and necessity.' Compare id. 346 U.S. at 91. And for the courts to determine whether the agency has done so, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' *Phelps Dodge Corp* v. *NLRB*, 313 U.S. 177, 197. The agency must make findings that support its decision, and those findings must be supported by substantial evidence. *Interstate Commerce Com.* v. *J-T Transport Co.*, 368 U.S. 81, 93; *United States* v. *Carolina Carriers Corp.*, 315 U.S. 475, 488, 489; *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U.S. 499, 511." *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167-8 (1962).

However, plaintiffs have repeatedly insisted that a remand to secure more precise findings would accomplish nothing. They maintain that the factual record is so deficient that no findings, however explicit, can support the order.

This court deems that the ICC was aware of what it was doing and intended the result it achieved. It did not purpose to go outside traditional guidelines or to establish new precedents designed to advance the equalization of all ports. New or improved findings would not serve to articulate the process of decision and expose the factual weaknesses.

The order stands or falls on the sufficiency of the findings made and the evidence to support them.

Before the ICC can equalize rates, there must be an adequate factual showing of (a) prejudice, and (b) prejudice which is undue resulting from a rate disparity or "misalignment of rates". *Atchison, T. & S. F. Ry.* v. *United States*, 218 F.Supp. 359, 363 (N.D. Ill., 1963). Plaintiffs assert that to make an initial showing of prejudice, rates to the more distant port must be shown to be higher *relative mileage considered* than those to the nearer port. If the rates *per mile* are not higher to the more distant port, plaintiffs claim that there is no showing of prejudice.[8]

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[8] Plaintiffs' claim is based on general language found in two ICC decisions:

> "However, the respondents have shown that the proposed rates are reasonably graded according to shortline distances, and since their proposal would allow the protestants rates which are *relatively no higher* than those afforded other shippers in the area, no basis exists for a finding of prejudice which is undue." (Emphasis supplied). *Grain from Groups I & J Origins to Pacific Coast*, 299 ICC 129, 134 (1956).

This court squarely rejects this mechanical definition of prejudice. Prejudice is a practical consequence in the practical world of transportation. That Corpus Christi is prejudiced is established by uncontradicted testimony in the record. Corpus Christi has ample shipping facilities and liner services. It is geographically and frequently by highway distances closer to this cotton origin territory than Houston-Galveston, yet Corpus Christi cannot get a single bale of cotton by rail for export.[4] Corpus Christi now gets practically no cotton from these origins by truck.[5] This result is a direct consequence of the rail rate structure. Shippers decline to ship cotton to Corpus Christi simply because it costs about 25¢ per bale more than does shipping to Houston-Galveston. Per mile or "distance considered" rates do not figure in their calculations.

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". . . it is difficult to understand how undue prejudice under section 3 can be present where rates are made on precisely the same level, mile for mile, from all competitive producing points to common destinations." *Paper from the South and Southwest*, 218 ICC 202, 216 (1936).

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[4] Since the issue is prejudice regarding cotton from these origins, the fact that Corpus Christi does get cotton from the Rio Grande Valley area of Texas has no bearing other than to demonstrate that Corpus Christi is a cotton port and can claim a right to compete for cotton from the origins in this case.

[5] Under a "truck allowance system" instituted by the railroads, rail rates are now lower to Houston-Galveston than the truck rates to Corpus Christi. However, on February 23, 1966, Division 2 of the ICC found the allowance system to be unlawful. *Allowances for Trucking Baled Cotton, Ark., Okla., Tex.*, 326 ICC 335 (1966).

If this result flows from the natural advantage and location of Houston-Galveston and the natural disadvantage of Corpus Christi in relation to them, then the ICC lacks authority to equalize the rail rates. "The law does not attempt to equalize fortune, opportunities, or abilities." *I.C.C.* v. *Diffenbaugh*, 222 U.S. 42, 46 (1911). " . . . the natural advantage which belongs to a locality does not constitute a preference." *Baltimore & O. R.R.* v. *United States*, 151 F.Supp. 258, 275 (D.Md., 1957).

However, there is more to natural advantage and location than geographic mileage differences, and shorter mileage to one port does not automatically give immunity from rate equalization.

> "It is true that the law does not attempt to equalize opportunities among localities (*Interstate Commerce Commission* v. *Diffenbaugh*, 222 U.S. 42, 46) and that the advantage which comes to a shipper merely as a result of the position of his plant does not constitute an illegal preference. . . . To bring a difference in rates within the prohibition of Sec. 3, it must be shown that the discrimination practiced is unjust when measured by the transportation standard. In other words, the difference in rates cannot be held illegal, unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions." *United States* v. *Illinois Central Ry.*, 263 U.S. 515, 524 (1924).

While mileage is important, the "transportation standard" includes other transportation conditions. *Boston & M. R.R.* v. *United States*, 202 F.Supp. 830 (D.Mass., 1962), aff'd 373 U.S. 372 (1963), 374 U.S. 859 (1963); *Atchison, T. & S. F. Ry.* v. *United States*, 231 F.Supp. 422, 430 (N.D. Ill., 1964); *City of Wilmington* v. *Alabama G. S. Ry.*, 316 ICC 709, 724-5 (1962). The Commission pointed out that the Corpus Christi and Houston-Galveston ports had been

equalized on cotton for a number of years before the railroads voluntarily reduced their rates to Houston. Rail rates for certain other commodities from these origins and others are equalized between the ports, some voluntarily and some by order of the ICC.[6] The ICC found that "The general terrain of the territory over which the defendants operate is the same whether the traffic moves to Corpus Christi or Houston-Galveston." (325 ICC 406). The ICC conclusion that Corpus Christi's disadvantage amounts to undue prejudice was clearly stated: "Transportation conditions are substantially the same from points of origin, although the distances are slightly more to Corpus Christi." (325 ICC 408).

The question of mileage is not a simple one, as the ICC emphasized. The examiner preferred percentage comparisons of short-line distances from 19 selected origins which gave an average difference of 14%. The Corpus Christi interest urged a weighted average which produced smaller variations.[7] The ICC considered the docket No. 28300 distances urged by Galveston interests which showed variations of 120 to 160 miles, or 20% on longer hauls and

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[6] These cases are cited because of their role as transportation conditions, and not as legal authority for the order under consideration: *Export Grain from Texas to Texas Points*, 319 ICC 16 (1963); *Nueces County Nav. Dist. No. 1* v. *Atchison, T. & S. F. Ry.*, 315 ICC 155 (1961); *Nueces County Nav. Dist. No. 1* v. *Abilene & S. Ry.*, 291 ICC 459 (1954).

[7]

| *Origin* | *Galveston* | *Corpus Christi* | *Difference* |
|---|---|---|---|
| New Mexico | 796 | 811 | 15 |
| Oklahoma | 516 | 613 | 97 |
| Texas | 581 | 648 | 67 |

Houston is 45 miles closer to these origins than Galveston.

60% on shorter hauls. The ICC did not reject the other standards, but emphasized docket No. 28300 distances to give consideration to the greatest mileage differences presented. Using these computations which showed the greatest mileage variations, the ICC made two findings:

> (1) "In relating export rates, distance is an important factor; however, equal rates have been required to related ports even where there have been substantial differences in distances." (325 ICC 408).
>
> (2) "Such ranges in distance have existed in prior proceedings from substantially the same origins to the same Texas ports . . . and equal rates have been required." (325 ICC 408).

The short-line route from Lubbock, Texas, the center of the heavy cotton production area, to Corpus Christi is 67 miles farther than to Galveston, which in turn is 45 miles farther than Houston. The railroads have already equalized Galveston and Houston, so the required equalization here is an additional 22 mile difference on a 646 mile haul.

The prior equalization of rates from these origins for other commodities is a relevant transportation condition. The ICC concluded that "no different conclusion is warranted in the instant proceedings." (325 ICC 408). This court cannot say that this decision was without a rational basis.[8]

Considering the record and findings as a whole, this court concludes that the ICC gave due consideration to the distance factor, and that its ultimate conclusion was well within its "broad discretion . . . to accommodate the

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[8] Nor is the decision precluded by the ICC's refusal to grant cotton equalization from these origins in 1929. Much has happened since then. *Nueces County Nav. Dist.* v. *Abilene & S. F. Ry.*, 155 ICC 712 (1929).

factors of transportation conditions, distance and competition." *Ayrshire Collieries Corp.* v. *United States, supra,* at 593.

It is therefore the opinion of this court that the ICC order should be enforced and the complaints dismissed.

Done at Houston, Texas, on this, the 11th day of August, A.D. 1966.

(sgd) *John R. Brown*
United States Circuit Judge

(sgd) *Allen B. Hannay*
United States District Judge

(sgd) *Joe Ingraham*
United States District Judge

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | |
|---|---|
| CITY OF GALVESTON, ET AL., *Plaintiffs,* vs. UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants.* | Civil Action No. 65-H-594 |

### JUDGMENT

I. For the reasons set out in the court's opinion of this date, it is

ORDERED, ADJUDGED AND DECREED

that the order of the Interstate Commerce Commission served on May 19, 1965, in the case of *Nueces County Navigation District No. 1* v. *Atchison, Topeka, and Santa Fe Railway Company, et al.*, 325 I.C.C. 400, be enforced and that the complaints of plaintiffs in this action be dismissed.

II. However, this court further believes that the temporary restraining order entered by this court on October 1, 1965 (as authorized by 28 U.S.C.A., Section 2324) should be extended through the disposition of appeal of this decision. Rule 62(c), Federal Rules of Civil Procedure; *Merchants' Warehouse Co.* v. *United States*, 283 U.S. 501 (1931). Implementation of the ICC order will require the cost of compiling, printing, and mailing new tariffs and will result in a loss of business to the plaintiff railroads

whose lines do not reach Corpus Christi. This court, viewing all the circumstances presented, believes that the changes required by the ICC order and the resulting irreparable damage to plaintiffs should not be instituted until the legality of the order is finally determined by the Supreme Court. Congress has provided an appeal of right to the Supreme Court from this court's decision. 28 U.S.C.A., Section 1253. Should no appeal be taken, the restraining order will cease.

Therefore, this judgment is stayed and shall not take effect until any appeal taken to the Supreme Court is finally determined, or, in the event no appeal is taken, this stay shall cease and this judgment shall become effective sixty days after this date.

Done at Houston, Texas, on this, the 11th day of August, A.D. 1966.

(sgd) *John R. Brown*
United States Circuit Judge

(sgd) *Allen B. Hannay*
United States District Judge

(sgd) *Joe Ingraham*
United States District Judge

## APPENDIX C

*Served May 19, 1965*

30266

## INTERSTATE COMMERCE COMMISSION

No. 34409[1]

NUECES COUNTY NAVIGATION DISTRICT NO. 1 v. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

*Decided May 7, 1965*

Assailed export rates on cotton, in carloads, from certain points in Oklahoma, New Mexico, and Texas to Corpus Christi, Tex., found to be unduly prejudicial to Corpus Christi and unduly preferential of other Texas ports. Undue preference and prejudice ordered removed.

*J. F. Jamison, Jr., Frank A. Leffingwell,* and *Robert B. Reedy* for complainants.

*Charles W. Bucy, Elmo F. Clark, Joseph E. Quin,* and *Clarence H. Williams* for the Secretary of Agriculture of the United States.

*M. P. Hamby* for intervener in support of complainants.

*Edwin N. Bell, John P. Ganly, Harvey Houston, Y. E. Juge, Don McDevitt, Milton E. Nelson, Jr., Sterling W. Steves, Thomas A. Stoery,* and *William A. Thie* for defendants.

*J. W. Boehl, L. F. Daspit, W. E. Fincher, E. B. McKinney, Carl S. Parker, Jr.,* and *Louis A. Schwartz* for interveners in support of defendants.

[1] This report embraces also No. 34409 (Sub-No. 1), Gulf Compress v. Atchison, Topeka & Santa Fe Railway Company et al.

REPORT AND ORDER OF THE COMMISSION

DIVISION 2, COMMISSIONERS FREAS, GOFF, AND TIERNEY

GOFF, *Commissioner:*

These proceedings present related issues, were heard on a consolidated record, and will be disposed of in one report. Exceptions to the recommended report and order of the examiner, and replies thereto, were filed by the parties and certain of the interveners. Our conclusions differ, in part, from those recommended. Exceptions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

In the title proceeding, by complaint filed on March 12, 1964, the complainant, a political subdivision of the State of Texas which owns and operates port terminal facilities at Corpus Christi, Nueces County, Tex., alleges that the carload rates[2] maintained by the defendants[3] on export cotton from points in Texas on and north of the line of the Texas and Pacific Railway Company between El Paso, Tex., and Shreveport, La., from points in New Mexico on and east of a line of the Santa Fe railway system between El Paso and Trinidad, Colo., and from points in Oklahoma, to the port

[2] Rates and differences in rates are stated per 100 pounds.

[3] The Atchison, Topeka and Santa Fe Railway Company; Beaver, Meade and Englewood Railroad Company; The Colorado and Southern Railway Company; Fort Worth and Denver Railway Company; Gulf, Colorado and Santa Fe Railway Company; Gulf, Mobile and Ohio Railroad Company; Illinois Central Railroad Company; The Kansas City Southern Railway Company; Kansas, Oklahoma & Gulf Railway Company; The Louisiana and North West Railroad Company; Louisiana Midland Railway Company; Midland Valley Railroad Company; Missouri-Kansas-Texas Railroad Company; Missouri Pacific Railroad Company; Oklahoma City-Ada-Atoka Railway Company; Panhandle and Santa Fe Railway Company; Quanah, Acme & Pacific Railway Company; St. Louis-San Francisco Railway Company; St. Louis Southwestern Railway Company; Southern Pacific Company; The Texas Mexican Railway Company; The Pecos Valley Southern Railway Company; Roscoe, Snyder and Pacific Railway Company; The Texas and Pacific Railway Company; and Texas-New Mexico Railway Company.

of Corpus Christi are unjust and unreasonable in violation of section 1 of the Interstate Commerce Act, and are unduly prejudicial to the port of Corpus Christi and unduly preferential of the ports of Galveston and Houston, Tex., and New Orleans, La., in violation of section 3(1) of the act. In No. 34409 (Sub-No. 1), a complaint was filed on March 23, 1964, by the Plains Cotton Cooperative Association, a cooperative cotton marketing association with headquarters at Lubbock, Tex.,[4] and the Gulf Compress, a cooperative corporation with a cotton compress and warehouse facility at Corpus Christi, alleging that the carload rates maintained by defendants[5] on cotton for export from the above-described origin territory to Corpus Christi are unjust and unreasonable, and unduly prejudicial to them and unduly preferential of competitors and other western gulf ports, including Houston and Galveston, and in some instances New Orleans. We are asked to issue a cease and desist order and to prescribe just, reasonable, and otherwise lawful rates, rules, regulations, and charges for the future.

The Secretary of Agriculture of the United States, the Brownsville Navigation District of Cameron County, Tex., and the Lubbock Cotton Exchange intervened in support of the complainants, and the board of trustees of the Galveston Wharves, the Galveston Cotton Exchange and Board of Trade, The New Orleans Traffic and Transportation Bureau, and the Houston Port Bureau, Inc., intervened in support of the defendants.

The complainants seek rates and related provisions on export shipments of cotton from the considered origins to

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[4] By order dated May 1, 1964, the Plains Cotton Cooperative Association was dismissed as party complainant, and this proceeding was then entitled Gulf Compress v. The Atchison, Topeka and Santa Fe Railway Company, et al.

[5] The defendants are listed in footnote 3 and, in addition, Hollis & Eastern Railroad Company.

Corpus Christi, the same as are maintained by the defendants on similar traffic to other western gulf ports, principally Houston, Galveston, and New Orleans. The ocean rates from Galveston, Houston, and Corpus Christi are the same. After the evidence was submitted, four of the defendants, namely, the Pecos Valley Southern, the Roscoe, Snyder & Pacific, the Texas-New Mexico, and the Texas & Pacific, reduced their rates from Fort Worth, Tex., and origins west thereof which are involved herein, on traffic exported through Corpus Christi, to not exceed those on corresponding traffic exported through Galveston, Houston, and New Orleans. In consideration of a motion filed in behalf of the complainants, those four carriers were dismissed as party defendants by order dated September 11, 1964. Also, effective October 28, 1964, many of the assailed rates were revised so that they now are 5 cents higher to Corpus Christi than the corresponding rates to Houston and Galveston. Representative rates from points in the involved origin territory are shown in the appendix attached hereto.

The port of Corpus Christi has 500,000 square feet of sheds at shipside available for handling export shipments of cotton, and there are about 25 miles of railroad track in the port area. This port is served by the Southern Pacific, the Missouri Pacific, and the Texas Mexican, and by about 157 steamship lines. About 42 of the latter carry cotton in regularly scheduled service. In 1962, there were 1,200 deep sea sailing departures registered from this port.

The origin area involved in these proceedings is the source of approximately 25 percent of all the cotton produced within the United States. The 2-year average production, 1962-63, was as follows:

| | | |
|---|---|---|
| Northern Texas | 3,123,753 | bales. |
| Oklahoma | 278,858 | bales. |
| Eastern New Mexico | 199,430 | bales. |
| Total | 3,602,041 | bales. |

The production in northern Texas is about 80 percent of the State's total, more than 50 percent of the latter being grown in the 10 counties of which Lubbock is the hub.

For the last 5 or 6 years, the ports of Galveston and Houston, respectively, had average yearly receipts of cotton of 1,990,469 and 1,393,679 bales, of which 1,491,220 and 909,396 bales were exported. At the port of Corpus Christi during the last 4 years, the average yearly export of cotton was 366,995 bales, of which an average of 110,944 bales came from the origin area described herein. Of the total unmanufactured cotton exported from these ports, Galveston, Corpus Christi, and Houston, respectively, handled 58, 9, and 33 percent in 1960, 56, 12, and 32 percent in 1962, and (based on incomplete figures) 49, 17, and 34 percent in 1963. During the last 4 years, the average amount exported from each port was 1,719,239, 366,995, and 1,019,929 bales which amounted to 55.4, 11.8, and 32.8 percent of the total. Gulf Compress receives and handles cotton at Corpus Christi. It has about 35 acres of floorspace and can store approximately 220,000 bales of flat cotton at one time. It is located about 2 miles from the docks, and it drays cotton to the public wharves. During the last five seasons, Gulf Compress had total receipts of cotton, as follows:

| Season | From complaint area | From other origins |
|---|---|---|
| | Bales | |
| 1959-60 | 16,742 | 191,865 |
| 1960-61 | 113,411 | 197,910 |
| 1961-62 | 65,529 | 203,673 |
| 1962-63 | 152,596 | 203,480 |
| 1963-64 | 44,438 | 166,913 |
| Total | 392,716 | 963,841 |

Of the tonnage originating in the complaint area 7,944 bales moved via rail in 1959, 4,750 bales moved via rail in 1960, and 4,875 bales moved via rail in 1961. Since that time all movements from the complaint area have been by truck.

The rates on cotton reflect an intrastate scale extended to interstate commerce, as adjusted under the general increase proceedings and to meet motor carrier competition. The defendants contend that the motor carrier competition is not as intense at Corpus Christi as at Houston and Galveston. However, during the last 4 years, an average of over 100,000 bales of cotton from the origin area involved herein were exported through Corpus Christi, and during the last 2 years all of this cotton moved by truck. The evidence does not show how much cotton moved from the involved origin area by rail or truck to Galveston and Houston, but the average receipts during the last four seasons from all origins to Galveston and Houston were as follows:

| | Galveston | Houston |
|---|---|---|
| By truck (bales) | 445,911 | 268,709 |
| By rail (bales) | 1,471,292 | 964,858 |
| Percent by truck | 30.3 | 27.8 |

From the Fort Worth and Denver Railway origins in Texas, some of the major rail and motor movements in 1963, in bales, were as follows:

| From | To — Houston | | Galveston | | Corpus Christi | |
|---|---|---|---|---|---|---|
| | Rail | Truck | Rail | Truck | Rail | Truck |
| Memphis | 17,861 | 4,663 | 39,666 | 9,965 | 0 | 2,543 |
| Plainview | 18,765 | 2,443 | 40,865 | 21,148 | 0 | 12,127 |
| Childress | 3,411 | 411 | 23,974 | 1,665 | 0 | 0 |
| Lubbock | 77,057 | 8,611 | 48,875 | 51,594 | 0 | 90,949 |

There is motor carrier competition for the cotton traffic from origins in the considered area to Corpus Christi. It is not possible on this record to compare the intensity of such competition with that at Houston and Galveston, since the record does not show the entire motor carrier movement from the considered area to the latter two ports. The matter of relative intensity of motor carrier competition was considered in *Export Grain from Texas to Texas Points*, 319 I.C.C. 16, in which, at page 25, the following was quoted with approval from *Fargo Chamber of Commerce* v. *Akron, C. & Y. R. Co.*, 306 I.C.C. 407, 412:

Even if it is true, as alleged by the defendants, that there is less motor-carrier competition at Fargo than at the Twin Cities, the difference is in degree and does not afford justification for the maintenance of the prejudicial relation. See *Fargo Chamber of Commerce* v. *Ahnapee & W. Ry. Co.*, 300 I.C.C. 289.

The railroads have inaugurated a so-called truck allowance system[6] in connection with substituted truck service, which has the effect of reducing the rail rates in effect prior to September 17, 1963, by an average of 10 cents. The allowance has had the effect of attracting to rails the traffic which has been moving to Corpus Christi by truck, and since the rail rates to Galveston and Houston are lower, the rail shipments would tend to move to those ports rather than to Corpus Christi. We agree with the examiner that Corpus Christi cannot hope to grow in those circumstances.

The defendants which do not serve Corpus Christi directly, participate in joint rates and routes to that port, but refuse to establish the same rates thereto as to Houston and Galveston. They fear that some of their traffic may be diverted from the ports which they serve, and on such traffic they would receive only a division of the through rates. If equal rates are required at the three Texas ports, these defendants will consider this factor before they establish motor competitive rates at the ports they serve. The ports of Galveston and Houston have adequate facilities to handle this cotton traffic and fear that if equal rates are established, some of their cotton traffic will be diverted to Corpus Christi. However, as stated in *Nueces County Nav. District No. 1* v. *Abilene & S. Ry. Co.*, 291 I.C.C. 459, at page 467, neither possible or probable diversion of traffic from, nor the adequacy of existing facilities at, ports presently

[6] Under investigation in I. and S. Docket No. 8008, Allowances for Trucking Baled Cotton, Ark., Okla., Texas, embracing also I. and S. Docket No. 8008 (Sub-No. 1), Allowances for Trucking Baled Cotton, Kans., N. Mex., Okla., Tex.; Docket Nos. 34326, Trucking Allowances on Baled Cotton, Ark., Okla., Texas; 34326 (Sub-No. 1), Substituted Truck Service Allowance on Cotton, Okla. & Texas; and 34326 (Sub-No. 2), Allowances for Trucking Cotton, Kans., N. Mex., Okla., and Texas.

handling the traffic are valid reasons for denying another port an opportunity to share in the business if it can induce shippers to use its facilities.

The examiner found that no evidence had been offered tending to show that the assailed rates exceed a reasonable maximum level. Complainants excepted to this conclusion. As complainants point out, there was a comparison made of the assailed rates with the lower export rates to the other ports. However, these compared rates were voluntarily established, have been in effect for some time, and are admittedly compensatory. The compared rates, as previously noted, are on a motor competitive level. Thus, they are not a proper yardstick to determine maximum reasonableness. *Keokuk Electro-Metals Co.* v. *Chicago & N.W. Ry. Co.*, 301 I.C.C. 55-57. We agree with the examiner that the evidence in this proceeding will not support a finding that the assailed rates exceed a just and reasonable level.

In connection with the complainants' allegation of undue preference and prejudice, as stated, they have included the port of New Orleans. The examiner concluded that New Orleans is not competitive with Corpus Christi for the considered export cotton traffic. The complainants urge on exceptions that since New Orleans has the same rates as Corpus Christi from some of the origins, and since shipments do move to New Orleans, the examiner's finding was in error. The evidence of movement referred to in the exceptions covers one shipment trucked to New Orleans just before a maritime strike, because there was not enough time to bring the shipment to Corpus Christi. We agree with the examiner that such evidence does not establish that the port of New Orleans is competitive with Corpus Christi for the considered cotton traffic.

Corpus Christi cannot expect to attract the rail movements of export cotton from the considered origins with higher rates than Galveston and Houston. The question is whether Corpus Christi's disadvantage amounts to un-

due prejudice, or, in other words, whether the higher rates to Corpus Christi and the lower rates to Houston and Galveston apply under substantially similar transportation circumstances. As previously noted, there is motor carrier competition on traffic to Corpus Christi. The general terrain of the territory over which the defendants operate is the same whether the traffic moves to Corpus Christi or Houston-Galveston. The existence of special facts justifying an inequity of treatment is a matter of defense to be proven by satisfactory evidence. See *Cudahy Packing Co.* v. *Akron C. & Y. R. Co.*, 318 I.C.C. 229, 245, affirmed *sub nom, Atchison, T. & S. F. Ry. Co.* v. *United States,* 218 F. Supp. 359.

The defendants refer to slower service from the considered origins to Corpus Christi than to Houston-Galveston. From Lubbock, for instance, the Atchison, Topeka & Santa Fe has single-line service to Houston and Galveston and offers second morning delivery, whereas to Corpus Christi it must interchange with another railroad, and the schedule calls for third morning delivery. Furthermore, the destination carriers at Corpus Christi divert a large percentage of the empty cars instead of returning them. These practices of the defendants, of themselves, however, do not warrant a rate inequity at the ports.

The origin territory involved in this proceeding is over 800 miles wide, and where higher rates are maintained to Corpus Christi than to Houston and Galveston, the distance from each origin to Corpus Christi is longer than to the other two ports. The examiner concluded that the best measure of the overall difference in the distances was a percentage comparison of the short-line rail distances from 19 selected origins[7] in the principal production area, which he considered to be representative, to Galveston and Corpus Christi. He computed those average distances to be 557.7 miles to Galveston and 636.2 miles to Corpus Christi, the latter being 14 percent longer. All of the parties filing

[7] Roswell and Lovington, N. Mex., and El Paso, Gainesville, Hamlin, Lamesa, Lubbock, Plainview, Seagraves, Sudan, Sweetwater, Childress, Chillicothe, Clarendon, Wichita Falls, Stanford, Abilene, Midland, and Pecos, Tex.

exceptions object either to the conclusion or to the selection of representative points. The complainants urge that the differences in distance be measured by the use of average distances from the origin counties in which the cotton was ginned, weighted to reflect the average number of bales ginned in such county, while the defendants argue that the distances over present tariff routes should be used. The Houston port interests support the use of the short-line distances from all points, and the Galveston port interests, the docket No. 28300[8] distances from the county seats. The average weighted distances from origins in New Mexico, Oklahoma, and Texas, respectively, are 796, 516, and 581 miles to Galveston, and 811, 613, and 648 miles to Corpus Christi. Other distances from representative points in Texas are shown in the following table:

| | | To— | |
|---|---|---|---|
| From— | Houston, Tex. | Galveston, Tex. | Corpus Christi, Tex. |
| | Miles | Miles | Miles |
| Childress | (1) 479.6 | 528 | 629 |
| | (2) 480 | 480 | 622 |
| | (3) 501.5 | 553.7 | 658.1 to 741.7 |
| Lubbock | (1) 533.7 | 579 | 646 |
| | (2) 525 | 525 | 646 |
| | (4) 574 | 579 | 699.6 to 704.6 |
| Plainview | (1) 580.5 | 626 | 693 |
| | (2) 572 | 572 | 693 |
| | (4) 621 | 626 | 746.6 to 751.6 |
| Wichita Falls | (1) 373.4 | 422 | 523 |
| | (2) 374 | 374 | 515 |
| | (3) 395.3 | 447.5 | 551.9 to 635.7 |

(1) Short-line distances.

(2) Docket No. 28300 distances.

(3) Fort Worth and Denver Railway direct to Houston and Galveston, and in connection with other carriers to Corpus Christi.

(4) Santa Fe lines direct to Houston and Galveston, and in connection with other lines to Corpus Christi.

[8] *Class Rates Investigation, 1939*, 262 I.C.C. 447, and supplemental reports.

We have used distances on different bases as determinative of particular issues, depending upon the evidence presented and the intended use of the distances. In relating export rates, distance is an important factor; however, equal rates have been required to related ports even where there have been substantial differences in distances. See *Hillsborough County Port Authority* v. *Ahnapee & W. Ry.*, 313 I.C.C. 691, affirmed *per curiam, sub nom, Alabama, T. & N. R. Co.* v. *United States*, 207 F. Supp. 638. In the instant proceedings, the docket No. 28300 distances, as noted in the above table, are about the same as the short-line distances from the various origins to Houston and Corpus Christi, and they are about 48 miles less than the short-line distance to Galveston. Omitting the origins in southeastern Oklahoma and northeastern Texas, hereinafter considered, the docket No. 28300 distances from the other origins from which different rates are still maintained to Corpus Christi exceed those to Houston by from approximately 120 to 160 miles, or from 20 percent on the longer hauls to 60 percent on the shorter hauls. Such ranges in distances have existed in prior proceedings from substantially the same origins to the same Texas ports, *Export Grain from Texas to Texas Points, supra, Nueces County Nav. Dist. No. 1* v. *Atchison, T. & S. F. Ry. Co.*, 315 I.C.C. 155, and *Nueces County Nav. District No. 1* v. *Abilene & S. Ry. Co., supra*, and equal rates have been required. No different conclusion is warranted in the instant proceedings. Transportation conditions are substantially the same from points of origin, although the distances are slightly more to Corpus Christi. The assailed rates appear to exercise so drastic an influence as to require port equalization.

The examiner found that the rates assailed are unduly prejudicial to the port of Corpus Christi and unduly preferential of Galveston and Houston, as in the proceedings cited next above. However, as noted, the complaints have been dismissed as to the Texas & Pacific and three other railroads upon the request of the complainants, although such railroads did not equalize their rates from stations

east of Fort Worth to Corpus Christi with those to Houston and Galveston. Dallas, Denton, and Marshall, Tex., are in this group, and, as noted in the appendix, the rates are higher to Corpus Christi than to the other two ports. The complainants have indicated that the action of the Texas & Pacific satisfied the complaints. Numerous origins on the Texas & Pacific east of Fort Worth are also served by other defendants, and no reason appears for requiring the other defendants to establish equal rates from these points to the three Texas ports. Moreover, the principal production of cotton in Oklahoma is shown to be in the western part, only two counties, Bryan (Durant, Okla.) and Muskogee, having any substantial production in the eastern part. Bryan County is a part of the same production area as the Texas origins east of Fort Worth, and should be treated the same ratewise. Traffic from Muskogee County to Corpus Christi could be transported through the eastern Texas and Bryan County production area, and rates to Corpus Christi on the Houston-Galveston level could cause higher rates to intermediate than to more distant points over the same line or route. Thus, the defendants will be expected to grade their rates to avoid violating the fourth-section principles.

The examiner found that the transit arrangements in connection with the assailed rates are less favorable to Corpus Christi than to Galveston and Houston, and that Corpus Christi was therefore unduly prejudiced in that respect also. However, the evidence indicates that there is now substantial equality in the transit services permitted on export cotton over existing routes to the gulf ports. The existing arrangements should be continued in connection with the rates required herein.

We find that the assailed rates on export cotton from origins in New Mexico on and east of the line of the Santa Fe Railway system extending from El Paso, Tex., to Trinidad, Colo., those in Texas on and north of the line of the Texas and Pacific Railway Company from El Paso to Fort Worth, Tex., and on and west of the Gulf, Colorado and

Santa Fe Railway from Fort Worth to Thackerville, Okla., and those in Oklahoma, except in Bryan County, to the port of Corpus Christi, Tex., are and for the future will be, unduly prejudicial to that port and unduly preferential of the ports of Houston and Galveston, Tex., to the extent that the rates to Corpus Christi exceed the corresponding rates to the latter ports.

COMMISSIONER FREAS, dissenting in part:

I disagree with the finding of undue preference and prejudice. To support such a finding it must be established that transportation conditions at the allegedly preferred and prejudiced points are substantially similar. As I see it, they are not.

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*It is ordered,* That the defendants named in the complaints, to the extent that they participate in the transportation, be, and they are hereby, notified and required to cease and desist on or before July 26, 1965, and thereafter to abstain, from practicing the undue prejudice and preference found herein to exist.

*It is further ordered,* That said defendants, according as they participate in the transportation, be, and they are hereby notified and required to establish, on or before July 26, 1965, upon not less than 30 days' notice to this Commission and to the general public by filing and posting in the manner prescribed under section 6 of the Interstate Commerce Act, and thereafter to maintain and apply rates which will prevent and avoid the undue preference and prejudice found herein to exist.

*And it is further ordered,* That this order shall continue in force until the further order of the Commission.

By the Commission, division 2.

BERTHA F. ARMES,
*Acting Secretary.*

(SEAL)

## APPENDIX

*Representative rail export rates on cotton in effect October 29, 1964, with the docket No. 28300 distances**

| From— | To— Corpus Christi, Tex. | | | | To— Houston-Galveston, Tex. | | | |
|---|---|---|---|---|---|---|---|---|
| | Distance | Col. 1 | Col. 2 | Col. 3 | Distance | Col. 1 | Col. 2 | Col. 3 |
| | Miles | Cents | Cents | Cents | Miles | Cents | Cents | Cents |
| New Mexico: | | | | | | | | |
| Clovis | 735 | 111 | 100 | 92 | 614 | 99 | 89 | 80 |
| Carlsbad | 735 | 117 | 107 | 99 | 614 | 105 | 93 | 85 |
| Las Cruces | 800 | 111 | 100 | 92 | 860 | 111 | 100 | 92 |
| Lovington | 710 | 102 | 91 | 83 | 589 | 102 | 91 | 83 |
| Portales | 735 | 111 | 100 | 92 | 614 | 99 | 89 | 80 |
| Roswell | 735 | 117 | 107 | 99 | 637 | 105 | 93 | 85 |
| Oklahoma: | | | | | | | | |
| Altus | 592 | 116 | 105 | 98 | 451 | 80 | 69 | 59.5 |
| Durant | 499 | 107 | 96 | 88 | 336 | 70 | 59.5 | 52.5 |
| El Reno | 611 | 116 | 105 | 98 | 470 | 80 | 69 | 59.5 |
| Guthrie | 638 | 116 | 105 | 98 | 479 | 90 | 79 | 70 |
| Muskogee | 636 | 116 | 105 | 98 | 473 | 80 | 69 | 59.5 |
| Tulsa | 682 | 121 | 110 | 103 | 518 | 90 | 79 | 70 |
| Texas: | | | | | | | | |
| Abilene | 500 | (1) 75 | 64.5 | 57.5 | 379 | 70 | 59.5 | 52.5 |
| | | (2) 70 | 59.5 | 52.5 | | 70 | 59.5 | 52.5 |
| Childress | 622 | 84.5 | 73.5 | 63.5 | 480 | 79.5 | 68.5 | 58.5 |
| Dallas | 415 | (2) 76 | 67 | 57.5 | 261 | 54.5 | 44.5 | 38.5 |
| | | (1) 59.5 | 49.5 | 43.5 | | 54.5 | 44.5 | 38.5 |
| Denton | 437 | 63.5 | 55.5 | 46.5 | 281 | 58.5 | 50.5 | 41.5 |
| Dimmit | 736 | 90.5 | 79.5 | 69.5 | 615 | 85.5 | 74.5 | 64.5 |

| From— | To Corpus Christi, Tex. Distance | Col. 1 | Col. 2 | Col. 3 | To Houston-Galveston, Tex. Distance | Col. 1 | Col. 2 | Col. 3 |
|---|---|---|---|---|---|---|---|---|
| | Miles | Cents | Cents | Cents | Miles | Cents | Cents | Cents |
| El Paso .. | 756 | 111 | 100 | 92 | 816 | 111 | 100 | 92 |
| Fort Worth | 415 (1) | 59.5 | 49.5 | 43.5 | 261 | 54.5 | 44.5 | 38.5 |
| | (2) | 54.5 | 44.5 | 38.5 | | 54.5 | 44.5 | 38.5 |
| Lamesa .. | 678 | 84.5 | 73.5 | 63.5 | 561 | 79.5 | 68.5 | 58.5 |
| Littlefield | 683 | 84.5 | 73.5 | 63.5 | 561 | 79.5 | 68.5 | 58.5 |
| Lubbock . | 646 | 84.5 | 73.5 | 63.5 | 525 | 79.5 | 68.5 | 58.5 |
| Marshall .. | 462 | 80 | 69 | 59.5 | 255 | 54.5 | 44.5 | 38.5 |
| Pecos ..... | 729 (2) | 97 | 85 | 77 | 608 | 97 | 85 | 77 |
| | (3) | 108 | 98 | 90 | | 105 | 93 | 85 |
| Sherman .. | 470 | 68.5 | 59.5 | 49.5 | 307 | 63.5 | 54.5 | 44.5 |
| Seymour .. | 567 | 75 | 64.5 | 57.5 | 426 | 70 | 59.5 | 52.5 |
| Sweetwater | 530 (1) | 76 | 65.5 | 58.5 | 409 | 71 | 60.5 | 53.5 |
| | (2) | 71 | 60.5 | 53.5 | | 71 | 60.5 | 53.5 |
| Wichita Falls .... | 515 | 75 | 64.5 | 57.5 | 374 | 70 | 59.5 | 52.5 |

Col. 1—Minimum 25,000 pounds.
Col. 2—Minimum 50,000 pounds.
Col. 3—Minimum 65,000 pounds.
(1) Defendants other than Texas & Pacific and associated lines.
(2) Texas & Pacific and associated lines.
(3) Panhandle & Santa Fe only.
* *Class Rate Investigation, 1939,* 262 I.C.C. 447, and later reports.

## APPENDIX D — page 1

**STATEMENT SHOWING RELATIVE LEVELS OF THE EXPORT RATES ON COTTON (MIN. WT. 50,000 POUNDS) FROM REPRESENTATIVE POINTS IN THE INVOLVED ORIGIN TERRITORY TO CORPUS CHRISTI, HOUSTON, AND GALVESTON.[1]**

| | TO CORPUS CHRISTI | | | TO GALVESTON-HOUSTON | | | PERCENTAGE RELATION OF CORPUS CHRISTI TO GALVESTON-HOUSTON | | |
|---|---|---|---|---|---|---|---|---|---|
| FROM (1) | Distance (Miles) (2) | First Class Rate (Cents) (3) | Export Cotton Rate (Cents) (4) | Distance (Miles) (5) | First Class Rate (Cents) (6) | Export Cotton Rate (Cents) (7) | Distance (%)[2] (8) | First Class Rate (%)[3] (9) | Export Cotton Rate (%)[4] (10) |
| TEXAS: | | | | | | | | | |
| Abilene | 500 | 323 | 64.5 | 379 | 280 | 59.5 | 132 | 115 | 108 |
| Childress | 622 | 370 | 73.5 | 480 | 316 | 68.5 | 130 | 117 | 107 |
| Dimmit | 736 | 405 | 79.5 | 615 | 363 | 74.5 | 120 | 112 | 107 |
| El Paso | 756 | 411 | 100.0 | 816 | 432 | 100.0 | 93 | 95 | 100 |
| Fort Worth | 415 | 296 | 49.5 | 261 | 242 | 44.5 | 159 | 122 | 111 |
| Lamesa | 678 | 384 | 73.5 | 561 | 350 | 68.5 | 121 | 110 | 107 |
| Littlefield | 683 | 391 | 73.5 | 561 | 350 | 68.5 | 122 | 112 | 107 |
| Lubbock | 646 | 378 | 73.5 | 525 | 337 | 68.5 | 123 | 112 | 107 |
| Pecos | 729 | 405 | 98.0 | 608 | 363 | 93.0 | 120 | 112 | 105 |
| Seymour | 567 | 350 | 64.5 | 426 | 302 | 59.5 | 133 | 116 | 108 |
| Sweetwater | 530 | 337 | 65.5 | 409 | 296 | 60.5 | 130 | 114 | 108 |
| Wichita Falls | 515 | 328 | 64.5 | 374 | 280 | 59.5 | 138 | 117 | 108 |
| AVERAGE | 615 | 365 | 73.2 | 501 | 326 | 68.8 | 127 | 113 | 107 |
| NEW MEXICO: | | | | | | | | | |
| Clovis[5] | 735 | 405 | 94.0 | 614 | 363 | 89.0 | 120 | 112 | 106 |
| Carlsbad[5] | 735 | 405 | 98.0 | 614 | 363 | 93.0 | 120 | 112 | 105 |
| Las Cruces | 800 | 426 | 100.0 | 860 | 447 | 100.0 | 93 | 95 | 100 |
| Lovington | 710 | 399 | 91.0 | 589 | 356 | 91.0 | 121 | 112 | 100 |
| Portales[5] | 735 | 405 | 94.0 | 614 | 363 | 89.0 | 120 | 112 | 106 |
| Roswell[5] | 735 | 405 | 98.0 | 637 | 370 | 93.0 | 115 | 109 | 105 |
| AVERAGE | 742 | 408 | 95.8 | 655 | 377 | 92.5 | 115 | 109 | 104 |
| OKLAHOMA: | | | | | | | | | |
| Altus | 592 | 356 | 105.0 | 451 | 308 | 69.0 | 131 | 116 | 152 |
| El Reno | 611 | 363 | 105.0 | 470 | 316 | 69.0 | 130 | 115 | 152 |
| Guthrie | 638 | 370 | 105.0 | 479 | 323 | 79.0 | 133 | 115 | 133 |
| Muskogee | 636 | 370 | 105.0 | 473 | 316 | 69.0 | 134 | 117 | 152 |
| Tulsa | 682 | 391 | 110.0 | 518 | 328 | 79.0 | 132 | 119 | 139 |
| AVERAGE | 632 | 370 | 106.0 | 478 | 318 | 73.0 | 132 | 116 | 146 |

## APPENDIX D — page 2

**STATEMENT SHOWING RELATIVE LEVELS OF THE EXPORT RATES ON COTTON (MIN. WT. 65,000 POUNDS) FROM REPRESENTATIVE POINTS IN THE INVOLVED ORIGIN TERRITORY TO CORPUS CHRISTI, HOUSTON, AND GALVESTON.[1]**

| | TO CORPUS CHRISTI | | | TO GALVESTON-HOUSTON | | | PERCENTAGE RELATION OF CORPUS CHRISTI TO GALVESTON-HOUSTON | | |
|---|---|---|---|---|---|---|---|---|---|
| FROM | Distance (Miles) | First Class Rate (Cents) | Export Cotton Rate (Cents) | Distance (Miles) | First Class Rate (Cents) | Export Cotton Rate (Cents) | Distance (%)[2] | First Class Rate (%)[3] | Export Cotton Rate (%)[4] |
| (1) | (2) | (3) | (4) | (5) | (6) | (7) | (8) | (9) | (10) |
| TEXAS: | | | | | | | | | |
| Abilene | 500 | 323 | 57.5 | 379 | 280 | 52.5 | 132 | 115 | 110 |
| Childress | 622 | 370 | 63.5 | 480 | 316 | 58.5 | 130 | 117 | 109 |
| Dimmit | 736 | 405 | 69.5 | 615 | 363 | 64.5 | 120 | 112 | 108 |
| El Paso | 756 | 411 | 92.0 | 816 | 432 | 92.0 | 93 | 95 | 100 |
| Fort Worth | 415 | 296 | 43.5 | 261 | 242 | 38.5 | 159 | 122 | 113 |
| Lamesa | 678 | 384 | 63.5 | 561 | 350 | 58.5 | 121 | 110 | 109 |
| Littlefield | 683 | 391 | 63.5 | 561 | 350 | 58.5 | 122 | 112 | 109 |
| Lubbock | 646 | 378 | 63.5 | 525 | 337 | 58.5 | 123 | 112 | 109 |
| Pecos | 729 | 405 | 90.0 | 608 | 363 | 85.0 | 120 | 112 | 106 |
| Seymour | 567 | 350 | 57.5 | 426 | 302 | 52.5 | 133 | 116 | 110 |
| Sweetwater | 530 | 337 | 58.5 | 409 | 296 | 53.5 | 130 | 114 | 109 |
| Wichita Falls | 515 | 328 | 57.5 | 374 | 280 | 52.5 | 138 | 117 | 110 |
| AVERAGE | 615 | 365 | 65.0 | 501 | 326 | 60.4 | 127 | 113 | 109 |
| NEW MEXICO: | | | | | | | | | |
| Clovis[5] | 735 | 405 | 85.0 | 614 | 363 | 80.0 | 120 | 112 | 106 |
| Carlsbad[5] | 735 | 405 | 90.0 | 614 | 363 | 85.0 | 120 | 112 | 106 |
| Las Cruces | 800 | 426 | 92.0 | 860 | 447 | 92.0 | 93 | 95 | 100 |
| Lovington | 710 | 399 | 83.0 | 589 | 356 | 83.0 | 121 | 112 | 100 |
| Portales[5] | 735 | 405 | 85.0 | 614 | 363 | 80.0 | 120 | 112 | 106 |
| Roswell[5] | 735 | 405 | 90.0 | 637 | 370 | 85.0 | 115 | 109 | 106 |
| AVERAGE | 742 | 408 | 87.5 | 655 | 377 | 84.2 | 115 | 109 | 104 |
| OKLAHOMA: | | | | | | | | | |
| Altus | 592 | 356 | 98.0 | 451 | 308 | 59.5 | 131 | 116 | 165 |
| El Reno | 611 | 363 | 98.0 | 470 | 316 | 59.5 | 130 | 115 | 165 |
| Guthrie | 638 | 370 | 98.0 | 479 | 323 | 70.0 | 133 | 115 | 140 |
| Muskogee | 636 | 370 | 98.0 | 473 | 316 | 59.5 | 134 | 117 | 165 |
| Tulsa | 682 | 391 | 103.0 | 518 | 328 | 70.0 | 132 | 119 | 147 |
| AVERAGE | 632 | 370 | 99.0 | 478 | 318 | 63.7 | 132 | 116 | 156 |

**NOTES:**

[1] Source of basic data: Cols. (3) and (6) are taken from exhibits (c), (d), and (e) to the verified statement of W. E. Fincher. All other basic data are from the appendix to the Commission's report. The rates maintained by the Texas & Pacific and associated lines are not shown for the reason that those carriers were dismissed as defendants by order dated September 11, 1964, and their rates are no longer at issue in the case. Dallas, Denton, Marshall, and Sherman, Tex., and Durant, Okla., have been eliminated as origins for the reason that the Commission did not require equalization of the rates from such origins. (See App. C, pp. 23-25)

[2] Col. (2) divided by Col. (5).

[3] Col. (3) divided by Col. (6).

[4] Col. (4) divided by Col. (7).

[5] Effective March 27, 1965, the export cotton rates from these stations to Corpus Christi were voluntarily reduced to be 5 cents over the corresponding rates to Galveston-Houston.

## SUBJECT INDEX


| | PAGE |
|---|---|
| Jurisdictional Statement | 1 |
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Statutes Involved | 3 |
| Questions Presented | 3 |
| Statement Of The Case | 5 |
| The Questions Are Substantial | 7 |
| Conclusion | 20 |
| Appendix A—(Opinion of the District Court) | App. 1 |
| Appendix B—(Judgment of the District Court) | App. 11 |
| Appendix C—(Report and Order of the Interstate Commerce Commission) | App. 13 |


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*Cases*


| | |
|---|---|
| Alabama G. S. R. Co. v. United States, 340 U.S. 216 (1951) | 8 |
| Atchison, Topeka and Santa Fe Ry. Co. v. United States, 218 F. Supp. 359 (1963) | 10 |
| Baltimore & Ohio R. Co. v. United States, 151 F. Supp. 258 (1957) | 8 |
| Boston & Maine R. R. v. United States, 202 F. Supp. 830 (1962) | 8, 9 |

PAGE

Burlington Truck Lines v. United States, 371 U.S. 156, 167-168 (1962) ..... 13, 18

City of Wilmington v. Alabama, G. S. Ry., 316 I.C.C. 709 (1962) ..... 8, 9

Dixie Highway Express v. United States, 242 F. Supp. 1016 (1965) ..... 15

Erie R. Co. v. United States, 59 F. Supp. 748 (1944) .. 14

Federal Trade Comm'n v. Colgate-Palmolive Co., 380 U.S. 374 (1965) ..... 9

Hillsborough County Port Authority v. Ahnapee & W. Ry., 313 I.C.C. 691 (1961) ..... 7, 11

Interstate Commerce Commission v. Baltimore & O. R. Co., 355 U. S. 175 (1957) ..... 8

Interstate Commerce Commission v. Diffenbaugh, 222 U.S. 42 (1911) ..... 8

Labor Board v. Metropolitan Ins. Co., 380 U.S. 438 (1965) ..... 13, 14, 17, 18

Mechling Barge Lines v. United States, 376 U.S. 375 (1964) ..... 2

Morgan v. United States, 298 U.S. 468 (1936) ..... 11-12

N.L.R.B. v. Mall, 119 F. 2d 700 (7th Cir. 1941) ..... 16

Nueces County Navigation Dist. No. 1 v. Abilene & Southern Ry. Co., 155 I.C.C. 712 (1929) ..... 15, 18

Secretary of Agriculture v. United States, 347 U.S. 645 (1954) ..... 14, 17

Securities & Exchange Commission v. Chenery Corp., 332 U.S. 194 (1947) ..... 18

Stanislaus County v. Atchison, T.&S.F. Ry. Co., 329 Ill. 40 (1966) ..... 8

PAGE

State Corp. Comm. of Kansas v. United States, 185 F. Supp. 691 (1959) ..... 10

State of New York v. United States, 331 U.S. 284 (1947) 8

Texas and Pacific R. Co. v. United States, 289 U.S. 627 (1933) ..... 8

United States v. Illinois Central R. Co., 263 U.S. 515 (1924) ..... 8, 10

*Statutes*

Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001, et seq.:

Section 8 (b) ..... 3, 4, 15, 16

Section 10 (e) ..... 3, 5, 19

Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C., et seq.:

Section 3(1) ..... 2, 3, 5, 6, 7, 8

Judicial Code, 62 Stat. 869, 28 U.S.C., et seq.:

Section 1253 ..... 2

Section 1336 ..... 2

Section 1398 ..... 2

Section 2101 (b) ..... 2

Section 2284 ..... 2

Section 2321 ..... 2

Section 2322 ..... 2

Section 2323 ..... 2

Section 2324 ..... 2

Section 2325 ..... 2

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

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## No.

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**THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,**

*Appellants,*

v.

**UNITED STATES OF AMERICA, ET AL.**

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On Appeal from the United States District Court for the Southern District of Texas.

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## JURISDICTIONAL STATEMENT

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Appellants, The Atchison, Topeka and Santa Fe Railway Company; Chicago, Rock Island and Pacific Railroad Company; Fort Worth and Denver Railway Company; and Missouri-Kansas-Texas Railroad Company, intervening plaintiffs in the court below, submit this statement disclosing the basis upon which the Supreme Court has jurisdiction, on appeal, to review the judgment of the District Court entered in this action.

## OPINIONS BELOW

The opinion of the District Court is reported at 257 F. Supp. 243. The court's opinion and its final judgment are reproduced herein as Appendix A (App. 1-10) and Appendix B (App. 11-12), respectively. The report and order of the Interstate Commerce Commission at issue appear at 325 I.C.C. 400 and are reproduced herein as Appendix C (App. 13-27).

## JURISDICTION

This action was brought in the United States District Court for the Southern District of Texas by the City of Galveston and the Board of Trustees of the Galveston Wharves; Galveston Cotton Exchange and Board of Trade; Houston Port Bureau, Inc.; Harris County-Houston Ship Channel Navigation District; Gulf Atlantic Warehouse Co.; and Manchester Terminal Corporation under 28 U.S.C., Sections 1336, 1398, 2284, and 2321-2325, and 5 U.S.C., Section 1009, to enjoin, set aside, and annul an order of the Interstate Commerce Commission issued under 49 U.S.C., Section 3(1). The railroad appellants intervened as parties plaintiff pursuant to 28 U.S.C., Section 2323. The judgment of the District Court dismissing the complaint was entered on August 11, 1966. Notice of appeal was filed in that court on October 7, 1966, by the railroad appellants. A separate notice of appeal was filed by the original plaintiffs.

Jurisdiction of the Supreme Court to review the decision of the District Court is conferred by 28 U.S.C., Sections 1253 and 2101(b), and is sustained by many decisions, including *Mechling Barge Lines* v. *United States*, 376 U.S. 375 (1964).

## STATUTES INVOLVED

Section 3(1) of the Interstate Commerce Act, 49 U.S.C., Section 3(1):

> It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, . . . locality, port, port district, . . . in any respect whatsoever; or to subject any particular person, . . . locality, port, port district, . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . .

Section 8(b) of the Administrative Procedure Act, 5 U.S.C., Section 1007(b):

> All decisions . . . shall . . include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; . . .

Section 10(e) of said Act, 5 U.S.C., Section 1009(e):

> So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, . . . It shall . . . (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (3) in excess of statutory jurisdiction, authority, or limitation, . . . (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8.

## QUESTIONS PRESENTED

The Interstate Commerce Commission, acting on a complaint filed by the port of Corpus Christi, ordered equalization of rail rates on export cotton to Corpus Christi from origins in northern Texas, eastern New Mexico and Oklahoma with corresponding rates to Houston and Galveston,

although it found that Corpus Christi is from twenty to sixty percent farther from the origin territory than Houston-Galveston (App. 23). The District Court sustained the Commission's order, and the following questions are presented by this appeal:

1. Whether the Commission has authority to compel the railroads to establish equal rates to competing ports despite substantial differences in distance.

2. Whether it is arbitrary and without rational basis for the Commission to conclude that transportation conditions attending the movement of traffic from the origin territory to the ports involved are "substantially the same, although the distances are slightly more to Corpus Christi," when it has found that Corpus Christi is from twenty to sixty percent, or from 120 to 160 miles, farther from the origin territory than Houston-Galveston.

3. Whether the Commission disclosed the basis of its order with adequate clarity when it offered two inconsistent rationales in support of its conclusion, one based upon the premise that differences in distance are slight and one based upon the premise that the Commission has authority to compel rate equalization despite substantial differences in distance.

4. Whether mere citation by the Commission of other proceedings in which it has ordered rate equalization provides a rational basis for the Commission's order in this proceeding.

5. Whether the Commission is required by Section 8(b) of the Administrative Procedure Act to explain the reason for its departure from its prior ruling that the differences

in distance from origins involved here preclude an order requiring equalization of export cotton rates to Corpus Christi with those to Houston-Galveston.

6. Whether the District Court erred in holding that "prior equalization from these origins for other commodities is a relevant transportation condition."

7. Whether the District Court erred in sustaining the Commission's order on grounds not relied upon by the Commission.

8. Whether the District Court correctly construed its function as a reviewing court under Section 10(e) of the Administrative Procedure Act.

## STATEMENT OF THE CASE

Acting upon a complaint filed by the port of Corpus Christi, Division 2 of the Interstate Commerce Commission found, by a majority of 2-1, that export cotton rates to Corpus Christi from northern Texas, eastern New Mexico and Oklahoma are unduly prejudicial under Section 3(1) of the Interstate Commerce Act [49 U.S.C. § 3(1)] insofar as they exceed corresponding rates to Houston-Galveston. The Commission ordered equalization of the rates. City of Galveston, et al., brought this action to set the Commission's order aside, and the railroad appellants intervened as parties plaintiff. The District Court sustained the Commission's order, and this appeal is taken from the District Court's judgment.

In its report, the Commission recognized that Corpus Christi is farther from the origin territory than Houston-Galveston, finding as follows (App. 21-23):

> The origin territory involved in this proceeding is over 800 miles wide, and where higher rates are maintained to Corpus Christi than to Houston and Galves-

> ton, the distance from each origin to Corpus Christi is longer than to the other two ports.
>
> • • •
>
> . . . the docket No. 28300 distance . . . to Corpus Christi exceeds those to Houston by from approximately 120 to 160 miles, or from 20 percent on the longer hauls to 60 percent on the shorter hauls.

Despite these significant differences in distance from the origin territory, the Commission found that it is unlawful under Section 3(1) for the railroads to maintain higher rates to Corpus Christi than to Houston-Galveston, and it ordered equalization.[1] The Commission seeks to rationalize its disregard of distance in three ways (App. 23):

> (1) In relating export rates, distance is an important factor; however, equal rates have been required to related ports even where there have been substantial differences in distances.
>
> (2) Such ranges in distances have existed in prior proceedings from substantially the same origins to the same Texas ports . . . and equal rates have been required. No different conclusion is warranted in the instant proceedings.
>
> (3) The assailed rates appear to exercise so drastic an influence as to require port equalization.

The Commission also makes a finding that the differences in distance are slight, which is inconsistent with its other rationalizations and which conflicts with its factual determinations (App. 23):

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[1] As shown in the appendix to the Commission's report (App. 26-27), the rates to Corpus Christi are higher in cents per hundred pounds than those to Houston-Galveston, but because of the longer distances, the rates to Corpus Christi are lower on a per-mile basis than those to Houston-Galveston.

Transportation conditions are substantially the same from points of origin, although the distances are slightly more to Corpus Christi.

## THE QUESTIONS ARE SUBSTANTIAL

1. A significant question raised by this appeal is whether the Commission has authority under Section 3(1) of the Interstate Commerce Act to compel the railroads to establish equal rates to competing ports despite substantial differences in distance. The right of the railroads to take distance into account in establishing freight rates is of crucial importance not only to the railroads but to the shipping public as well. If the Commission has the power to vitiate this right and to compel equalization of rates to more distant ports, uneconomic and wasteful transportation service will be encouraged and the railroads' ability to maintain rates low enough to move goods economically in export commerce and low enough to meet unregulated competition will be substantially impaired.

In the present case, the Commission has made a finding that Corpus Christi is from twenty to sixty percent farther from the origin territory and has rationalized its order, in part, on the ground that equalization of rates to ports has been required even where there have been substantial differences in distance, citing *Hillsborough County Port Authority* v. *Ahnapee & W. Ry.*, 313 I.C.C. 691 (1961). Judicial interpretation of Section 3(1), however, denies the authority sought to be exercised by the Commission in this case. It has been consistently recognized by the courts that a disadvantage which comes to a person or locality as a result of location does not constitute a prejudice within the meaning of Section 3(1) and that the Commission is without authority to adjust freight rates for the purpose of neutralizing natural geographic disadvantages. *Interstate*

*Commerce Commission* v. *Diffenbaugh*, 222 U.S. 42, 46 (1911); *United States* v. *Illinois Central R. Co.*, 263 U.S. 515, 524 (1924); *Texas and Pacific R. Co.* v. *United States*, 289 U.S. 627, 629 (1933); *State of New York* v. *United States*, 331 U.S. 284, 331-332 (1947); *Alabama G. S. R. Co.* v. *United States*, 340 U.S. 216 (1951); *Baltimore & Ohio R. Co.* v. *United States*, 151 F. Supp. 258, 275 (1957), vacated on other grounds, *I.C.C.* v. *Baltimore & O. R. Co.*, 355 U.S. 175 (1957).[2]

The District Court acknowledges the validity of this construction of Section 3(1), but it seeks to introduce a qualification. It states that while mileage is important, other transportation conditions are to be considered in determining whether there is undue prejudice, implying that distance differences may be overridden by other factors (App. 7). The court cites *Boston & M. R.R.* v. *United States*, 202 F. Supp. 830 (1962), affirmed 373 U.S. 372; and *City of Wilmington* v. *Alabama, G. S. Ry.*, 316 I.C.C. 709, 724-725 (1962), as authority for this proposition. These cases are inapposite. They involved the lawfulness of voluntary equalization of rates to more distant ports by the railroads, and the question presented was whether equal rates for longer hauls would be prejudicial to the nearer ports. Consequently, these decisions do not stand for the proposition that the Commission may compel equalization of rates to more distant ports nor do they qualify the construction of Section 3(1) set forth in the *Diffenbaugh* and *Illinois Central* cases. In fact, the court in *Boston*

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[2] The Commission itself applied this principle in a recent case in which it cited the *Diffenbaugh* and *Illinois Central* cases for the proposition that it is "not empowered to remove disadvantages caused by natural environment." *Stanislaus County* v. *A.T.&S.F. Ry.*, 329 I.C.C. 40, 53-54 (1966).

*& M. R.R.* v. *United States* pointed out that there is a basic distinction between what the railroads may do voluntarily and what the Commission may compel them to do under Section 3(1), and the court set aside a Commission order which failed to observe this distinction. See 202 F. Supp. 830 at 837.[3]

The District Court essentially avoids the question of whether the Commission has authority to compel equalization of rates to more distant ports when it defines prejudice as a "practical consequence in the practical world of transportation" (App. 6).[4] Using this definition, the

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[3] The inapplicability of decisions involving voluntary equalization of more distant ports is drawn into sharp focus by analysis of the *Wilmington* case. There the Commission held that the railroads could voluntarily establish equalization, but only insofar as distances to the more distant port did not exceed those to the nearer ports by more than twenty-five percent. Thus, if the railroads here had sought to equalize Corpus Christi voluntarily, the Commission, under *Wilmington*, would have to find such equalization unduly prejudicial *to Houston-Galveston* from many of the origin points involved here. Consequently, the *Wilmington* case is not authority for a conclusion that the absence of equalization from these same origins is prejudicial *to Corpus Christi*. The anomaly results from the District Court's failure to recognize that while the railroads may, in some circumstances, voluntarily equalize more distant ports, the Commission is without authority to compel them to do so. Cf. *Boston & M. R.R.* v. *United States*, 202 F.Supp. 830 (1962). *New York Produce Exchange* v. *Baltimore & O. R. Co.*, 7 I.C.C. Rep. 612 (1898).

[4] The Court concludes that the Commission has "broad discretion" in determining the existence of undue prejudice (App. 9-10). The court fails to recognize, however, that the Commission has no discretion to exceed the limitations on its authority laid down by the Supreme Court in construing Section 3(1) in the *Diffenbaugh* and *Illinois Central* cases. Cf. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965).

court concludes that prejudice is established "by uncontradicted testimony in the record" (App. 6). The testimony relied upon by the court, however, all relates to the question of whether Corpus Christi is deprived of traffic, i.e., is injured, by the rate structure. Thus, the District Court has failed to observe that the question of injury is separate from the question of whether there is any prejudicial treatment in the first instance. Cf. *Atchison, Topeka and Santa Fe Ry. Co.* v. *United States*, 218 F.Supp. 359, 363 (1963). The Commission also appears to have erroneously equated prejudice with injury when it stated that equalization is required because of the "drastic influence" of the rates (App. 23). The injury question, however, arises only after prejudicial treatment has been shown, and prejudicial treatment must be established with reference to relative transportation conditions. *United States* v. *Illinois Central R. Co.*, 263 U.S. 515, 524 (1924).

2. The Commission's lack of authority to use Section 3(1) as a means of neutralizing natural geographic disadvantages is a corollary of the rule that there is no undue prejudice unless relative transportation conditions are substantially similar. *Atchison, Topeka and Santa Fe Ry. Co.* v. *United States*, 218 F. Supp. 359, 363 (1963); *State Corp. Comm. of Kansas* v. *United States*, 185 F. Supp. 691, 698 (1959). The Commission, cognizant of this basic rule of law, found that "transportation conditions are substantially the same from points of origin, although the distances are slightly more to Corpus Christi" (App. 23). The District Court construed this finding as a clear statement that Corpus Christi's "disadvantage amounts to undue prejudice" (App. 8). This finding, however, is directly at odds with the Commission's analysis of the distance relationships showing that Corpus

Christi is from twenty to sixty percent, or from 120 to 160 miles, farther from the origin territory than Houston-Galveston (App. 23).[5]

We took the position before the District Court that it was arbitrary for the Commission to characterize distance differences of this magnitude as slight and that the Commission had no rational basis upon which to conclude, in the face of its own analysis of the distance relationships, that transportation conditions are substantially the same. Moreover, the Commission seems to have been clearly aware of the fact that the distance differences in this proceeding are material when it cited *Hillsborough County Port Authority* v. *Ahnapee & W. Ry.*, 313 I.C.C. 691 (1961), for the proposition that rate equalization may be required "even where there have been substantial differences in distances." In point of fact, the distance differences involved in that proceeding were somewhat less than those involved here, underscoring the arbitrary nature of the Commission's attempt to characterize comparable distance differences as slight in this proceeding and highlighting the lack of rational basis for the Commission's conclusion that transportation conditions are "substantially the same."[6] In *Morgan* v.

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[5] This analysis is based upon Docket No. 28300 mileages which were constructed by the Commission in another proceeding to establish properly related class rates. Docket No. 28300 class rates have often been used as a test for lawful rate relationships for specific commodities. See *Cudahy Packing Co.* v. *Akron C.& Y. R. Co.*, 318 I.C.C. 229, 245 (1962), affirmed *Atchison, Topeka and Santa Fe Ry. Co.* v. *United States*, 218 F. Supp. 359 (1963).

[6] In *Hillsborough County Port Authority* v. *Ahnapee & W. Ry.*, Tampa, the complaining port was, on the average, 1214 rail-miles from the origin territory. This was approximately 25% farther from that territory than the south Atlantic ports involved, 29% farther than west Gulf ports and 38% farther than east Gulf ports.

*United States*, 298 U.S. 468, 480 (1936), the Supreme Court held that for an administrative order to be valid there must be evidence adequate to support pertinent and necessary findings of fact. *A fortiori*, when the Commission's own analysis of the evidence contradicts a pertinent and necessary finding of fact, that finding is arbitrary and cannot constitute a rational basis for the Commission's order. Although this issue was raised below, the District Court failed to give any consideration to this elementary deficiency in the Commission's report.

3. The Commission's finding that distance differences are slight and transportation conditions substantially the same is inconsistent with the legal conclusion offered as a rationalization for its decision, i.e., that equalization may be required even where there are substantial differences in distance. This inconsistency raises considerable doubt as to the ultimate basis of the Commission's order, and the District Court has fallen prey to the resulting ambiguity. The court states that the finding that distance differences are slight and transportation conditions the same is a clear statement that "Corpus Christi's disadvantage amounts to undue prejudice" (App. 8). Yet, at the same time, the court reasons that distance is not a controlling factor and finds that the Commission's statement that equalization may be required even where differences in distance are substantial is a valid supporting finding (App. 9). These are logically and factually inconsistent bases of decision.

The District Court revealed the source of its logical difficulties as follows (App. 3-4):

> The I.C.C. findings under review here are sketchy and present this court with difficulties which more explicit findings would remove. The I.C.C. opinion is so imprecise in revealing just what findings it is making

> that the order borders dangerously on running afoul of the requirement that agencies disclose the basis of their orders.

The inability of the District Court to decide whether the Commission's order was based upon a conclusion that distance differences are slight or upon an assumed discretion to require equal rates despite substantial distance differences demonstrates that the Commission's report lacks the requisite clarity and disclosure to be valid and that the District Court erred in not remanding the proceeding to the Commission on this ground. *Burlington Truck Lines v. United States*, 371 U.S. 156, 167-168 (1962); *Labor Board v. Metropolitan Ins. Co.*, 380 U.S. 438, 443 (1965).

4. The Commission sought to support its order by reference to three prior proceedings in which rates to Corpus Christi on grain and grain products were equalized with rates to other Gulf ports, including Houston and Galveston.[7] Although those proceedings involved different commodities and different port relationships (which give rise to different distance relationships) from those involved here, the Commission failed to explain why those proceedings are controlling on the specific facts of record in this proceeding. Instead, the Commission merely stated that "no different conclusion is warranted in the instant proceedings" (App. 23).

We took the position before the District Court that mere citation of prior proceedings does not constitute a sufficient articulation of the basis of the Commission's order in this

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[7] *Nueces County Navigation District No. 1 v. Abilene & Southern Ry.*, 291 I.C.C. 459 (1954); *Nueces County Navigation District No. 1 v. Atchison, T. & S.F. Ry. Co.*, 315 I.C.C. 155 (1961); *Export Grain from Texas to Texas Points*, 319 I.C.C. 16 (1963).

proceeding. *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 653-654 (1954); *Erie R. Co.* v. *United States*, 59 F. Supp. 748 (1944). This is particularly so when, as will appear below, the Commission gave no consideration in its report to a contrary ruling in a prior proceeding involving the same commodity, the same origins and the same port relationships as those involved here. See *Labor Board* v. *Metropolitan Ins. Co.*, 380 U.S. 438, 442-3 (1965).

The District Court's treatment of the Commission's reliance upon prior proceedings involving Corpus Christi is very ambiguous. The court seemingly agrees that mere reference to other proceedings cannot lawfully constitute a substitute for adequate findings based upon specific evidence of record when, referring to the proceedings relied upon by the Commission, it states in footnote 6 of its opinion (App. 8):

> These cases are cited because of their role as transportation conditions, and not as legal authority for the order under consideration . . .[8]

However, the District Court states subsequently (App. 9):

> The I.C.C. concluded that "no different conclusion is warranted in the instant proceedings." (325 I.C.C. 408). This court cannot say that this decision was without a rational basis.

Here the District Court seems to regard the Commission's mere citation of prior proceedings as providing a rational basis for the Commission's order in this case. However, the District Court does not and cannot state what specific findings in those cases rationally support the Commission's order on the particular facts of record in this proceeding.

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[8] This interesting definition of "transportation conditions" is discussed below.

Whether, in these circumstances, an unexplained application of *stare decisis* satisfies the requirements of Section 8(b) of the Administrative Procedure Act is a question of considerable public importance.

5. Directly at odds with the Commission's reliance on prior proceedings involving rates on other commodities is the absence of any mention in its report of *Nueces County Navigation Dist. No. 1* v. *Abilene & Southern Ry. Co.*, 155 I.C.C. 712 (1929), a prior proceeding involving rates on cotton from the same origins involved here which were alleged to be prejudicial to Corpus Christi and preferential of Houston-Galveston. Discussing the assailed rates from Texas and Oklahoma in terms of the respective distances to Corpus Christi and Houston, the Commission concluded:

> The distances to Houston range from 49 to 524 miles from the Texas points, and from 335 to 595 miles from the Oklahoma points. *The distances to Corpus Christi exceed those to Houston by an average of 130 miles from the Texas points, and 163 miles from the Oklahoma points.*
>
> The port of Corpus Christi is more remote from the heavy cotton producing sections than the other Texas ports, *its disadvantage in this respect being of such a substantial character as to preclude a requirement by us that it be neutralized by freight rate adjustment.* (155 I.C.C. at 716, emphasis supplied).

We took the position before the District Court that where the Commission enters an order directly contrary to a prior ruling, it is arbitrary for the Commission to fail to make specific findings indicating the reasoning by which it holds its prior ruling to be inapplicable. See *Dixie Highway Express* v. *United States*, 242 F. Supp. 1016, 1021 (1965), in which a three-judge court observed:

> The doctrine of *stare decisis* does not apply to decisions of administrative bodies, but consistency of

> administrative rulings is essential, for to adopt different standards for similar situations is to act arbitrarily.

See also *N.L.R.B.* v. *Mall*, 119 F.2d 700 (7th Cir. 1941).

The District Court rejected our argument in a curious fashion in footnote 8 of its opinion (App. 9):

> Nor is the decision precluded by the I.C.C.'s refusal to grant cotton equalization from these origins in 1929. Much has happened since then.

This, of course, completely avoids the issue. The question is not whether the Commission is bound by its prior decision. It is whether the Commission is required to make findings which explain the basis of its departure from a prior ruling.[9]

We recognize that inconsistency is not necessarily fatal to administrative action. However, as the facts of this case demonstrate, there are times when the basis of an inconsistency is a material question as to which findings are required by Section 8(b) of the Administrative Procedure Act. Here the Commission has held on the one hand that distance differences preclude equalization and on the other hand that the same distance differences may now be ignored. The Commission's failure to explain this direct departure from its prior ruling raises the question of whether it has modified its interpretation of Section 3(1) or whether there may be special factors involved in the

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[9] Moreover, the District Court's effort to take upon itself the burden of distinguishing the Commission's prior ruling falls surprisingly short of the mark. The factor which led the Commission to hold that it was precluded from equalizing Corpus Christi with Houston-Galveston from points in Texas and Oklahoma was the comparative distance relationships. While much has happened since 1929, this particular factor has not been affected by the passage of time.

present proceedings that were not involved in the prior proceeding. In an analogous case, the Supreme Court remanded a decision of the Commission on the basis of inadequate findings. *Secretary of Agriculture* v. *United States,* 347 U.S. 645 (1954). In *Labor Board* v. *Metropolitan Ins. Co.,* 380 U.S. 438, 442-3 (1965), the Supreme Court held that where an agency relies upon certain prior proceedings without articulating the reasons for their applicability and fails to distinguish other contrary proceedings, its order lacks the clarity required for judicial review. That is precisely the situation presented here.

6. The District Court, in apparent recognition of the fact that the mileage differences in this case are significant, states (App. 7):

> While mileage is important, the "transportation standard" includes other transportation conditions.

The court goes on to hold that "prior equalization of rates from these origins for other commodities is a relevant transportation condition" (App. 9).

This is a novel interpretation of the term "transportation condition." As used by the Supreme Court and the Commission itself, the term "transportation condition" relates to the circumstances and conditions attending the movement of the particular commodities at issue between the particular points involved. By concluding that equalization of rates on totally unrelated commodities with transportation characteristics of their own is a relevant factor to be considered in appraising the relative transportation conditions involved in the movement of cotton, the District Court has made a fundamental error in construing Section 3(1) and has advanced a new theory that would have far reaching effects upon the future administration of those provisions.

7. In adopting the novel view that equalization of rates on unrelated commodities is a "relevant transportation condition," the District Court has sought to sustain the Commission's order on grounds not relied upon by the Commission. As is clear on the face of its report, the Commission relied upon prior equalization of rates on other commodities as legal authority for its action, not as a "transportation condition." Consequently, the District Court's opinion is in conflict with *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947); *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168 (1962); and *Labor Board* v. *Metropolitan Ins. Co.*, 380 U.S. 438, 444 (1965).

The District Court also engaged in *post hoc* rationalization when it attempted unsuccessfully to distinguish *Nueces County Navigation District No. 1* v. *Abilene & Southern Ry.*, 155 I.C.C. 712, a decision not considered in the Commission's report. Another example of *post hoc* rationalization is found in the court's statement (App. 7-8):

> The Commission pointed out that the Corpus Christi and Houston-Galveston ports had been equalized for a number of years before the railroads voluntarily reduced their rates to Houston.

This information, contrary to the court's statement, does not appear in the Commission's report but was suggested in the Government's brief. Finally, the District Court accords weight to the fact that the railroads have voluntarily equalized Corpus Christi on some commodities (App. 8). Here again, this information does not appear anywhere in the Commission's report but was supplied by the defendants as a *post hoc* rationalization of the Commission's order.

9. We believe that the errors of the District Court can be traced to its belief that remanding the case to the Commission would accomplish nothing. After acknowledging the lack of clarity in the Commission's report, the court says (App. 4):

> No purpose would be accomplished by returning the case to the I.C.C. for further findings.

After stating that it could not support the order on new rationales advanced by the defendants (a rule which it disregarded), the District Court says (App. 5):

> However, plaintiffs have insisted that a remand to secure more precise findings would accomplish nothing. They maintain that the factual record is so deficient that no findings, however explicit, can support the order.

This is not a correct statement of the position of the railroad appellants. Our position was that if the District Court adopted our view that the Commission is without authority to compel rate equalization where there are substantial differences in distance, the Commission would be precluded from finding a violation of Section 3(1) on the evidence of record in this case. However, we also took the position that the Commission's order was arbitrary, without rational basis, deficient in findings and lacking in the requisite clarity to be valid. The District Court, rejecting our first argument, has neglected the other deficiencies in the Commission's report and has sustained the Commission's order on grounds not relied upon by the Commission. Section 10(e) of the Administrative Procedure Act requires a reviewing court to set aside administrative orders which are arbitrary, without rational basis, deficient in findings and lacking in the requisite clarity, and the fact that the court believes the same result would be reached by the Commission on remand does not relieve it of this obligation.

## CONCLUSION.

For the reasons stated, the questions presented by this appeal are substantial and are of public importance. It is respectfully submitted that probable jurisdiction should be noted.

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December 2, 1966

## APPENDIX A

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| CITY OF GALVESTON, ET AL., *Plaintiffs*, vs. UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants.* | | Civil Action No. 65-H-594 |

Before BROWN, *Circuit Judge*, and HANNAY and INGRAHAM *District Judges.*

INGRAHAM, *District Judge:*

The ports of Houston and Galveston and four of the original twenty-six defendant railroads seek to set aside an order of the Interstate Commerce Commission entered in *Nueces County Navigation District No. 1* v. *Atchison, Topeka and Santa Fe Railway Company, et al.*, 325 I.C.C. 400 (1965). The order held that the export rates for cotton from specified origins in northern Texas, Oklahoma and New Mexico were unduly prejudicial to the port of Corpus Christi and unduly preferential to the ports of Houston and Galveston, in violation of Section 3(1) of the Interstate Commerce Act, 49 U.S.C.A., Section 3(1).[1]

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[1] Section 3(1) of the Interstate Commerce Act, 49 U.S.C.A., Section 3(1):

"It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port

This court concludes that the order is supported by substantial evidence, is consistent with Section 3(1), and meets the requirements of the Administrative Procedure Act, 5 U.S.C.A., Section 1001, *et seq.* This court enforces the order by denying relief and dismissing the cause on its merits.

This court properly performs only a very limited role in reviewing a decision of an administrative body such as the ICC. Once a rational basis for the conclusions of an administrative body is found, the judicial function is ended. *Mississippi Valley Barge Line Co. v. United States,* 292 U.S. 282, 286-7 (1934). Courts are not empowered to weigh the wisdom of a particular decision:

> "It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law." *United States* v. *Pierce Auto Freight Lines, Inc.,* 327 U.S. 515, 536 (1946).

Courts have long recognized the application of this principle to discriminatory rail rate situations and pointed to the particular considerations which support the rule in this area. Whether a discrimination or preference is undue, unreasonable and unjust is a determination for the

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district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . ."

ICC to make. *Nashville, C. & St. L. Ry.* v. *Tennessee,* 262 U.S. 318, 322 (1923). A court "has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it." *Virginian Ry.* v. *United States,* 272 U.S. 658, 665-6 (1926). Congress has constituted the ICC as the expert body which is informed by experience to determine whether undue discriminations exist in rail rates.

> "The complexities and involvements of railroad rates are not to be shifted from the shoulders of the experts commissioned to handle them to the backs of the judiciary; nor are the broad powers of judgment conferred upon the experts to be unduly hampered." *Koppers Company, Inc.* v. *United States,* 166 F.Supp. 96, 103 (W.D. Pa. 1958).

This court must determine whether the Commission has followed correct legal procedures and principles, but beyond that this court is permitted no greater role than ascertaining whether there exists a rational basis for the ICC order.

> " . . . We would depart from our competence and our limited function in their field if we undertook to accommodate the factors of transportation conditions, distance and competition differently than the Commission has done in this case. This is a task peculiarly for it." *Ayrshire Collieries Corp.* v. *United States,* 335 U.S. 573, 593 (1949).

The ICC findings under review here are sketchy and present this court with difficulties which more explicit findings would remove. The ICC opinion is so imprecise in revealing just what findings it is making that the order

borders dangerously on running afoul of the requirement that agencies disclose the basis of their orders.[2]

However, this court concludes that the findings are adequate under Section 8(b) of the Administrative Procedure Act, 5 U.S.C.A., Section 1007(b). No purpose would be accomplished by returning the case to the ICC for further findings.

The ICC decision here must be tested on the basis of what it contains, and not on any new ideas offered to support it. The United States, the ICC, and the defendant intervenors have offered new rationales for the ICC order, but whatever their merits, such suggestions could only call for remand to the agency for consideration. *S. E. C.* v. *Chenery Corp.*, 318 U.S. 80, 94-5 (1943).

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[2] "Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion.' *New York* v. *United States*, 342 U.S. 882, 884 (dissenting opinion). 'Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body.' *Federal Communications Com.* v. *RCA Communications, Inc.*, 346 U.S. 86, 90. The Commission must exercise its discretion under Sec. 207(a) within the bounds expressed by the standard of 'public convenience and necessity.' Compare id. 346 U.S. at 91. And for the courts to determine whether the agency has done so, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197. The agency must make findings that support its decision, and those findings must be supported by substantial evidence. *Interstate Commerce Com.* v. *J-T Transport Co.*, 368 U.S. 81, 93; *United States* v. *Carolina Carriers Corp.*, 315 U.S. 475, 488, 489; *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U.S. 499, 511." *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167-8 (1962).

However, plaintiffs have repeatedly insisted that a remand to secure more precise findings would accomplish nothing. They maintain that the factual record is so deficient that no findings, however explicit, can support the order.

This court deems that the ICC was aware of what it was doing and intended the result it achieved. It did not purpose to go outside traditional guidelines or to establish new precedents designed to advance the equalization of all ports. New or improved findings would not serve to articulate the process of decision and expose the factual weaknesses.

The order stands or falls on the sufficiency of the findings made and the evidence to support them.

Before the ICC can equalize rates, there must be an adequate factual showing of (a) prejudice, and (b) prejudice which is undue resulting from a rate disparity or "misalignment of rates". *Atchison, T. & S. F. Ry.* v. *United States*, 218 F.Supp. 359, 363 (N.D. Ill., 1963). Plaintiffs assert that to make an initial showing of prejudice, rates to the more distant port must be shown to be higher *relative mileage considered* than those to the nearer port. If the rates *per mile* are not higher to the more distant port, plaintiffs claim that there is no showing of prejudice.[3]

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[3] Plaintiffs' claim is based on general language found in two ICC decisions:

> "However, the respondents have shown that the proposed rates are reasonably graded according to shortline distances, and since their proposal would allow the protestants rates which are *relatively no higher* than those afforded other shippers in the area, no basis exists for a finding of prejudice which is undue." (Emphasis supplied). *Grain from Groups I & J Origins to Pacific Coast*, 299 ICC 129, 134 (1956).

This court squarely rejects this mechanical definition of prejudice. Prejudice is a practical consequence in the practical world of transportation. That Corpus Christi is prejudiced is established by uncontradicted testimony in the record. Corpus Christi has ample shipping facilities and liner services. It is geographically and frequently by highway distances closer to this cotton origin territory than Houston-Galveston, yet Corpus Christi cannot get a single bale of cotton by rail for export.[4] Corpus Christi now gets practically no cotton from these origins by truck.[5] This result is a direct consequence of the rail rate structure. Shippers decline to ship cotton to Corpus Christi simply because it costs about 25¢ per bale more than does shipping to Houston-Galveston. Per mile or "distance considered" rates do not figure in their calculations.

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". . . it is difficult to understand how undue prejudice under section 3 can be present where rates are made on precisely the same level, mile for mile, from all competitive producing points to common destinations." *Paper from the South and Southwest*, 218 ICC 202, 216 (1936).

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[4] Since the issue is prejudice regarding cotton from these origins, the fact that Corpus Christi does get cotton from the Rio Grande Valley area of Texas has no bearing other than to demonstrate that Corpus Christi is a cotton port and can claim a right to compete for cotton from the origins in this case.

[5] Under a "truck allowance system" instituted by the railroads, rail rates are now lower to Houston-Galveston than the truck rates to Corpus Christi. However, on February 23, 1966, Division 2 of the ICC found the allowance system to be unlawful. *Allowances for Trucking Baled Cotton, Ark., Okla., Tex.*, 326 ICC 335 (1966).

If this result flows from the natural advantage and location of Houston-Galveston and the natural disadvantage of Corpus Christi in relation to them, then the ICC lacks authority to equalize the rail rates. "The law does not attempt to equalize fortune, opportunities, or abilities." *I.C.C.* v. *Diffenbaugh,* 222 U.S. 42, 46 (1911). " . . . the natural advantage which belongs to a locality does not constitute a preference." *Baltimore & O. R.R.* v. *United States,* 151 F.Supp. 258, 275 (D.Md., 1957).

However, there is more to natural advantage and location than geographic mileage differences, and shorter mileage to one port does not automatically give immunity from rate equalization.

> "It is true that the law does not attempt to equalize opportunities among localities (*Interstate Commerce Commission* v. *Diffenbaugh,* 222 U.S. 42, 46) and that the advantage which comes to a shipper merely as a result of the position of his plant does not constitute an illegal preference. . . . To bring a difference in rates within the prohibition of Sec. 3, it must be shown that the discrimination practiced is unjust when measured by the transportation standard. In other words, the difference in rates cannot be held illegal, unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions." *United States* v. *Illinois Central Ry.,* 263 U.S. 515, 524 (1924).

While mileage is important, the "transportation standard" includes other transportation conditions. *Boston & M. R.R.* v. *United States,* 202 F.Supp. 830 (D.Mass., 1962), aff'd 373 U.S. 372 (1963), 374 U.S. 859 (1963); *Atchison, T. & S. F. Ry.* v. *United States,* 231 F.Supp. 422, 430 (N.D. Ill., 1964); *City of Wilmington* v. *Alabama G. S. Ry.,* 316 ICC 709, 724-5 (1962). The Commission pointed out that the Corpus Christi and Houston-Galveston ports had been

equalized on cotton for a number of years before the railroads voluntarily reduced their rates to Houston. Rail rates for certain other commodities from these origins and others are equalized between the ports, some voluntarily and some by order of the ICC.[6] The ICC found that "The general terrain of the territory over which the defendants operate is the same whether the traffic moves to Corpus Christi or Houston-Galveston." (325 ICC 406). The ICC conclusion that Corpus Christi's disadvantage amounts to undue prejudice was clearly stated: "Transportation conditions are substantially the same from points of origin, although the distances are slightly more to Corpus Christi." (325 ICC 408).

The question of mileage is not a simple one, as the ICC emphasized. The examiner preferred percentage comparisons of short-line distances from 19 selected origins which gave an average difference of 14%. The Corpus Christi interest urged a weighted average which produced smaller variations.[7] The ICC considered the docket No. 28300 distances urged by Galveston interests which showed variations of 120 to 160 miles, or 20% on longer hauls and

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[6] These cases are cited because of their role as transportation conditions, and not as legal authority for the order under consideration: *Export Grain from Texas to Texas Points,* 319 ICC 16 (1963); *Nueces County Nav. Dist. No. 1* v. *Atchison, T. & S. F. Ry.,* 315 ICC 155 (1961); *Nueces County Nav. Dist. No. 1* v. *Abilene & S. Ry.,* 291 ICC 459 (1954).

[7]

| *Origin* | *Galveston* | *Corpus Christi* | *Difference* |
|---|---|---|---|
| New Mexico | 796 | 811 | 15 |
| Oklahoma | 516 | 613 | 97 |
| Texas | 581 | 648 | 67 |

Houston is 45 miles closer to these origins than Galveston.

60% on shorter hauls. The ICC did not reject the other standards, but emphasized docket No. 28300 distances to give consideration to the greatest mileage differences presented. Using these computations which showed the greatest mileage variations, the ICC made two findings:

> (1) "In relating export rates, distance is an important factor; however, equal rates have been required to related ports even where there have been substantial differences in distances." (325 ICC 408).
>
> (2) "Such ranges in distance have existed in prior proceedings from substantially the same origins to the same Texas ports . . . and equal rates have been required." (325 ICC 408).

The short-line route from Lubbock, Texas, the center of the heavy cotton production area, to Corpus Christi is 67 miles farther than to Galveston, which in turn is 45 miles farther than Houston. The railroads have already equalized Galveston and Houston, so the required equalization here is an additional 22 mile difference on a 646 mile haul.

The prior equalization of rates from these origins for other commodities is a relevant transportation condition. The ICC concluded that "no different conclusion is warranted in the instant proceedings." (325 ICC 408). This court cannot say that this decision was without a rational basis.[8]

Considering the record and findings as a whole, this court concludes that the ICC gave due consideration to the distance factor, and that its ultimate conclusion was well within its "broad discretion . . . to accommodate the

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[8] Nor is the decision precluded by the ICC's refusal to grant cotton equalization from these origins in 1929. Much has happened since then. *Nueces County Nav. Dist.* v. *Abilene & S. F. Ry.*, 155 ICC 712 (1929).

factors of transportation conditions, distance and competition." *Ayrshire Collieries Corp.* v. *United States, supra,* at 593.

It is therefore the opinion of this court that the ICC order should be enforced and the complaints dismissed.

Done at Houston, Texas, on this, the 11th day of August. A.D. 1966.

(sgd) *John R. Brown*
United States Circuit Judge

(sgd) *Allen B. Hannay*
United States District Judge

(sgd) *Joe Ingraham*
United States District Judge

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | |
|---|---|
| CITY OF GALVESTON, ET AL., *Plaintiffs*, vs. UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants.* | Civil Action No. 65-H-594 |

### JUDGMENT

I. For the reasons set out in the court's opinion of this date, it is

ORDERED, ADJUDGED AND DECREED

that the order of the Interstate Commerce Commission served on May 19, 1965, in the case of *Nueces County Navigation District No. 1* v. *Atchison, Topeka, and Santa Fe Railway Company, et al.*, 325 I.C.C. 400, be enforced and that the complaints of plaintiffs in this action be dismissed.

II. However, this court further believes that the temporary restraining order entered by this court on October 1, 1965 (as authorized by 28 U.S.C.A., Section 2324) should be extended through the disposition of appeal of this decision. Rule 62(c), Federal Rules of Civil Procedure; *Merchants' Warehouse Co.* v. *United States*, 283 U.S. 501 (1931). Implementation of the ICC order will require the cost of compiling, printing, and mailing new tariffs and will result in a loss of business to the plaintiff railroads

whose lines do not reach Corpus Christi. This court, viewing all the circumstances presented, believes that the changes required by the ICC order and the resulting irreparable damage to plaintiffs should not be instituted until the legality of the order is finally determined by the Supreme Court. Congress has provided an appeal of right to the Supreme Court from this court's decision. 28 U.S.C.A., Section 1253. Should no appeal be taken, the restraining order will cease.

Therefore, this judgment is stayed and shall not take effect until any appeal taken to the Supreme Court is finally determined, or, in the event no appeal is taken, this stay shall cease and this judgment shall become effective sixty days after this date.

Done at Houston, Texas, on this, the 11th day of August, A.D. 1966.

(sgd) *John R. Brown*
United States Circuit Judge

(sgd) *Allen B. Hannay*
United States District Judge

(sgd) *Joe Ingraham*
United States District Judge

## APPENDIX C

*Served May 19, 1965*

30266

## INTERSTATE COMMERCE COMMISSION

No. 34409[1]

NUECES COUNTY NAVIGATION DISTRICT NO. 1 v. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

*Decided May 7, 1965*

Assailed export rates on cotton, in carloads, from certain points in Oklahoma, New Mexico, and Texas to Corpus Christi, Tex., found to be unduly prejudicial to Corpus Christi and unduly preferential of other Texas ports. Undue preference and prejudice ordered removed.

*J. F. Jamison, Jr., Frank A. Leffingwell,* and *Robert B. Reedy* for complainants.

*Charles W. Bucy, Elmo F. Clark, Joseph E. Quin,* and *Clarence H. Williams* for the Secretary of Agriculture of the United States.

*M. P. Hamby* for intervener in support of complainants.

*Edwin N. Bell, John P. Ganly, Harvey Houston, Y. E. Juge, Don McDevitt, Milton E. Nelson, Jr., Sterling W. Steves, Thomas A. Stoery,* and *William A. Thie* for defendants.

*J. W. Boehl, L. F. Daspit, W. E. Fincher, E. B. McKinney, Carl S. Parker, Jr.,* and *Louis A. Schwartz* for interveners in support of defendants.

[1] This report embraces also No. 34409 (Sub-No. 1), Gulf Compress v. Atchison, Topeka & Santa Fe Railway Company et al.

REPORT AND ORDER OF THE COMMISSION

DIVISION 2, COMMISSIONERS FREAS, GOFF, AND TIERNEY

GOFF, *Commissioner:*

These proceedings present related issues, were heard on a consolidated record, and will be disposed of in one report. Exceptions to the recommended report and order of the examiner, and replies thereto, were filed by the parties and certain of the interveners. Our conclusions differ, in part, from those recommended. Exceptions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

In the title proceeding, by complaint filed on March 12, 1964, the complainant, a political subdivision of the State of Texas which owns and operates port terminal facilities at Corpus Christi, Nueces County, Tex., alleges that the carload rates[2] maintained by the defendants[3] on export cotton from points in Texas on and north of the line of the Texas and Pacific Railway Company between El Paso, Tex., and Shreveport, La., from points in New Mexico on and east of a line of the Santa Fe railway system between El Paso and Trinidad, Colo., and from points in Oklahoma, to the port

[2] Rates and differences in rates are stated per 100 pounds.

[3] The Atchison, Topeka and Santa Fe Railway Company; Beaver, Meade and Englewood Railroad Company; The Colorado and Southern Railway Company; Fort Worth and Denver Railway Company; Gulf, Colorado and Santa Fe Railway Company; Gulf, Mobile and Ohio Railroad Company; Illinois Central Railroad Company; The Kansas City Southern Railway Company; Kansas, Oklahoma & Gulf Railway Company; The Louisiana and North West Railroad Company; Louisiana Midland Railway Company; Midland Valley Railroad Company; Missouri-Kansas-Texas Railroad Company; Missouri Pacific Railroad Company; Oklahoma City-Ada-Atoka Railway Company; Panhandle and Santa Fe Railway Company; Quanah, Acme & Pacific Railway Company; St. Louis-San Francisco Railway Company; St. Louis Southwestern Railway Company; Southern Pacific Company; The Texas Mexican Railway Company; The Pecos Valley Southern Railway Company; Roscoe, Snyder and Pacific Railway Company; The Texas and Pacific Railway Company; and Texas-New Mexico Railway Company.

of Corpus Christi are unjust and unreasonable in violation of section 1 of the Interstate Commerce Act, and are unduly prejudicial to the port of Corpus Christi and unduly preferential of the ports of Galveston and Houston, Tex., and New Orleans, La., in violation of section 3(1) of the act. In No. 34409 (Sub-No. 1), a complaint was filed on March 23, 1964, by the Plains Cotton Cooperative Association, a cooperative cotton marketing association with headquarters at Lubbock, Tex.,[4] and the Gulf Compress, a cooperative corporation with a cotton compress and warehouse facility at Corpus Christi, alleging that the carload rates maintained by defendants[5] on cotton for export from the above-described origin territory to Corpus Christi are unjust and unreasonable, and unduly prejudicial to them and unduly preferential of competitors and other western gulf ports, including Houston and Galveston, and in some instances New Orleans. We are asked to issue a cease and desist order and to prescribe just, reasonable, and otherwise lawful rates, rules, regulations, and charges for the future.

The Secretary of Agriculture of the United States, the Brownsville Navigation District of Cameron County, Tex., and the Lubbock Cotton Exchange intervened in support of the complainants, and the board of trustees of the Galveston Wharves, the Galveston Cotton Exchange and Board of Trade, The New Orleans Traffic and Transportation Bureau, and the Houston Port Bureau, Inc., intervened in support of the defendants.

The complainants seek rates and related provisions on export shipments of cotton from the considered origins to

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[4] By order dated May 1, 1964, the Plains Cotton Cooperative Association was dismissed as party complainant, and this proceeding was then entitled Gulf Compress v. The Atchison, Topeka and Santa Fe Railway Company, et al.

[5] The defendants are listed in footnote 3 and, in addition, Hollis & Eastern Railroad Company.

Corpus Christi, the same as are maintained by the defendants on similar traffic to other western gulf ports, principally Houston, Galveston, and New Orleans. The ocean rates from Galveston, Houston, and Corpus Christi are the same. After the evidence was submitted, four of the defendants, namely, the Pecos Valley Southern, the Roscoe, Snyder & Pacific, the Texas-New Mexico, and the Texas & Pacific, reduced their rates from Fort Worth, Tex., and origins west thereof which are involved herein, on traffic exported through Corpus Christi, to not exceed those on corresponding traffic exported through Galveston, Houston, and New Orleans. In consideration of a motion filed in behalf of the complainants, those four carriers were dismissed as party defendants by order dated September 11, 1964. Also, effective October 28, 1964, many of the assailed rates were revised so that they now are 5 cents higher to Corpus Christi than the corresponding rates to Houston and Galveston. Representative rates from points in the involved origin territory are shown in the appendix attached hereto.

The port of Corpus Christi has 500,000 square feet of sheds at shipside available for handling export shipments of cotton, and there are about 25 miles of railroad track in the port area. This port is served by the Southern Pacific, the Missouri Pacific, and the Texas Mexican, and by about 157 steamship lines. About 42 of the latter carry cotton in regularly scheduled service. In 1962, there were 1,200 deep sea sailing departures registered from this port.

The origin area involved in these proceedings is the source of approximately 25 percent of all the cotton produced within the United States. The 2-year average production, 1962-63, was as follows:

| | | |
|---|---|---|
| Northern Texas | 3,123,753 | bales. |
| Oklahoma | 278,858 | bales. |
| Eastern New Mexico | 199,430 | bales. |
| Total | 3,602,041 | bales. |

The production in northern Texas is about 80 percent of the State's total, more than 50 percent of the latter being grown in the 10 counties of which Lubbock is the hub.

For the last 5 or 6 years, the ports of Galveston and Houston, respectively, had average yearly receipts of cotton of 1,990,469 and 1,393,679 bales, of which 1,491,220 and 909,396 bales were exported. At the port of Corpus Christi during the last 4 years, the average yearly export of cotton was 366,995 bales, of which an average of 110,944 bales came from the origin area described herein. Of the total unmanufactured cotton exported from these ports, Galveston, Corpus Christi, and Houston, respectively, handled 58, 9, and 33 percent in 1960, 56, 12, and 32 percent in 1962, and (based on incomplete figures) 49, 17, and 34 percent in 1963. During the last 4 years, the average amount exported from each port was 1,719,239, 366,995, and 1,019,929 bales which amounted to 55.4, 11.8, and 32.8 percent of the total. Gulf Compress receives and handles cotton at Corpus Christi. It has about 35 acres of floorspace and can store approximately 220,000 bales of flat cotton at one time. It is located about 2 miles from the docks, and it drays cotton to the public wharves. During the last five seasons, Gulf Compress had total receipts of cotton, as follows:

| Season | From complaint area | From other origins |
|---|---|---|
| | Bales | |
| 1959-60 | 16,742 | 191,865 |
| 1960-61 | 113,411 | 197,910 |
| 1961-62 | 65,529 | 203,673 |
| 1962-63 | 152,596 | 203,480 |
| 1963-64 | 44,438 | 166,913 |
| Total | 392,716 | 963,841 |

Of the tonnage originating in the complaint area 7,944 bales moved via rail in 1959, 4,750 bales moved via rail in 1960, and 4,875 bales moved via rail in 1961. Since that time all movements from the complaint area have been by truck.

The rates on cotton reflect an intrastate scale extended to interstate commerce, as adjusted under the general increase proceedings and to meet motor carrier competition. The defendants contend that the motor carrier competition is not as intense at Corpus Christi as at Houston and Galveston. However, during the last 4 years, an average of over 100,000 bales of cotton from the origin area involved herein were exported through Corpus Christi, and during the last 2 years all of this cotton moved by truck. The evidence does not show how much cotton moved from the involved origin area by rail or truck to Galveston and Houston, but the average receipts during the last four seasons from all origins to Galveston and Houston were as follows:

| | Galveston | Houston |
|---|---|---|
| By truck (bales) | 445,911 | 268,709 |
| By rail (bales) | 1,471,292 | 964,858 |
| Percent by truck | 30.3 | 27.8 |

From the Fort Worth and Denver Railway origins in Texas, some of the major rail and motor movements in 1963, in bales, were as follows:

| From | To — Houston | | Galveston | | Corpus Christi | |
|---|---|---|---|---|---|---|
| | Rail | Truck | Rail | Truck | Rail | Truck |
| Memphis | 17,861 | 4,663 | 39,666 | 9,965 | 0 | 2,543 |
| Plainview | 18,765 | 2,443 | 40,865 | 21,148 | 0 | 12,127 |
| Childress | 3,411 | 411 | 23,974 | 1,665 | 0 | 0 |
| Lubbock | 77,057 | 8,611 | 48,875 | 51,594 | 0 | 90,949 |

There is motor carrier competition for the cotton traffic from origins in the considered area to Corpus Christi. It is not possible on this record to compare the intensity of such competition with that at Houston and Galveston, since the record does not show the entire motor carrier movement from the considered area to the latter two ports. The matter of relative intensity of motor carrier competition was considered in *Export Grain from Texas to Texas Points*, 319 I.C.C. 16, in which, at page 25, the following was quoted with approval from *Fargo Chamber of Commerce* v. *Akron, C. & Y. R. Co.*, 306 I.C.C. 407, 412:

Even if it is true, as alleged by the defendants, that there is less motor-carrier competition at Fargo than at the Twin Cities, the difference is in degree and does not afford justification for the maintenance of the prejudicial relation. See *Fargo Chamber of Commerce v. Ahnapee & W. Ry. Co.*, 300 I.C.C. 289.

The railroads have inaugurated a so-called truck allowance system[6] in connection with substituted truck service, which has the effect of reducing the rail rates in effect prior to September 17, 1963, by an average of 10 cents. The allowance has had the effect of attracting to rails the traffic which has been moving to Corpus Christi by truck, and since the rail rates to Galveston and Houston are lower, the rail shipments would tend to move to those ports rather than to Corpus Christi. We agree with the examiner that Corpus Christi cannot hope to grow in those circumstances.

The defendants which do not serve Corpus Christi directly, participate in joint rates and routes to that port, but refuse to establish the same rates thereto as to Houston and Galveston. They fear that some of their traffic may be diverted from the ports which they serve, and on such traffic they would receive only a division of the through rates. If equal rates are required at the three Texas ports, these defendants will consider this factor before they establish motor competitive rates at the ports they serve. The ports of Galveston and Houston have adequate facilities to handle this cotton traffic and fear that if equal rates are established, some of their cotton traffic will be diverted to Corpus Christi. However, as stated in *Nueces County Nav. District No. 1 v. Abilene & S. Ry. Co.*, 291 I.C.C. 459, at page 467, neither possible or probable diversion of traffic from, nor the adequacy of existing facilities at, ports presently

[6] Under investigation in I. and S. Docket No. 8008, Allowances for Trucking Baled Cotton, Ark., Okla., Texas, embracing also I. and S. Docket No. 8008 (Sub-No. 1), Allowances for Trucking Baled Cotton, Kans., N. Mex., Okla., Tex.; Docket Nos. 34326, Trucking Allowances on Baled Cotton, Ark., Okla., Texas; 34326 (Sub-No. 1), Substituted Truck Service Allowance on Cotton, Okla. & Texas; and 34326 (Sub-No. 2), Allowances for Trucking Cotton, Kans., N. Mex., Okla., and Texas.

handling the traffic are valid reasons for denying another port an opportunity to share in the business if it can induce shippers to use its facilities.

The examiner found that no evidence had been offered tending to show that the assailed rates exceed a reasonable maximum level. Complainants excepted to this conclusion. As complainants point out, there was a comparison made of the assailed rates with the lower export rates to the other ports. However, these compared rates were voluntarily established, have been in effect for some time, and are admittedly compensatory. The compared rates, as previously noted, are on a motor competitive level. Thus, they are not a proper yardstick to determine maximum reasonableness. *Keokuk Electro-Metals Co.* v. *Chicago & N.W. Ry. Co.*, 301 I.C.C. 55-57. We agree with the examiner that the evidence in this proceeding will not support a finding that the assailed rates exceed a just and reasonable level.

In connection with the complainants' allegation of undue preference and prejudice, as stated, they have included the port of New Orleans. The examiner concluded that New Orleans is not competitive with Corpus Christi for the considered export cotton traffic. The complainants urge on exceptions that since New Orleans has the same rates as Corpus Christi from some of the origins, and since shipments do move to New Orleans, the examiner's finding was in error. The evidence of movement referred to in the exceptions covers one shipment trucked to New Orleans just before a maritime strike, because there was not enough time to bring the shipment to Corpus Christi. We agree with the examiner that such evidence does not establish that the port of New Orleans is competitive with Corpus Christi for the considered cotton traffic.

Corpus Christi cannot expect to attract the rail movements of export cotton from the considered origins with higher rates than Galveston and Houston. The question is whether Corpus Christi's disadvantage amounts to un-

due prejudice, or, in other words, whether the higher rates to Corpus Christi and the lower rates to Houston and Galveston apply under substantially similar transportation circumstances. As previously noted, there is motor carrier competition on traffic to Corpus Christi. The general terrain of the territory over which the defendants operate is the same whether the traffic moves to Corpus Christi or Houston-Galveston. The existence of special facts justifying an inequity of treatment is a matter of defense to be proven by satisfactory evidence. See *Cudahy Packing Co.* v. *Akron C. & Y. R. Co.*, 318 I.C.C. 229, 245, affirmed *sub nom, Atchison, T. & S. F. Ry. Co.* v. *United States*, 218 F. Supp. 359.

The defendants refer to slower service from the considered origins to Corpus Christi than to Houston-Galveston. From Lubbock, for instance, the Atchison, Topeka & Santa Fe has single-line service to Houston and Galveston and offers second morning delivery, whereas to Corpus Christi it must interchange with another railroad, and the schedule calls for third morning delivery. Furthermore, the destination carriers at Corpus Christi divert a large percentage of the empty cars instead of returning them. These practices of the defendants, of themselves, however, do not warrant a rate inequity at the ports.

The origin territory involved in this proceeding is over 800 miles wide, and where higher rates are maintained to Corpus Christi than to Houston and Galveston, the distance from each origin to Corpus Christi is longer than to the other two ports. The examiner concluded that the best measure of the overall difference in the distances was a percentage comparison of the short-line rail distances from 19 selected origins[7] in the principal production area, which he considered to be representative, to Galveston and Corpus Christi. He computed those average distances to be 557.7 miles to Galveston and 636.2 miles to Corpus Christi, the latter being 14 percent longer. All of the parties filing

[7] Roswell and Lovington, N. Mex., and El Paso, Gainesville, Hamlin, Lamesa, Lubbock, Plainview, Seagraves, Sudan, Sweetwater, Childress, Chillicothe, Clarendon, Wichita Falls, Stanford, Abilene, Midland, and Pecos, Tex.

exceptions object either to the conclusion or to the selection of representative points. The complainants urge that the differences in distance be measured by the use of average distances from the origin counties in which the cotton was ginned, weighted to reflect the average number of bales ginned in such county, while the defendants argue that the distances over present tariff routes should be used. The Houston port interests support the use of the short-line distances from all points, and the Galveston port interests, the docket No. 28300[8] distances from the county seats. The average weighted distances from origins in New Mexico, Oklahoma, and Texas, respectively, are 796, 516, and 581 miles to Galveston, and 811, 613, and 648 miles to Corpus Christi. Other distances from representative points in Texas are shown in the following table:

| | | To— | |
|---|---|---|---|
| From— | Houston, Tex. | Galveston, Tex. | Corpus Christi, Tex. |
| | Miles | Miles | Miles |
| Childress ..... | (1) 479.6 | 528 | 629 |
| | (2) 480 | 480 | 622 |
| | (3) 501.5 | 553.7 | 658.1 to 741.7 |
| Lubbock ..... | (1) 533.7 | 579 | 646 |
| | (2) 525 | 525 | 646 |
| | (4) 574 | 579 | 699.6 to 704.6 |
| Plainview ..... | (1) 580.5 | 626 | 693 |
| | (2) 572 | 572 | 693 |
| | (4) 621 | 626 | 746.6 to 751.6 |
| Wichita Falls .. | (1) 373.4 | 422 | 523 |
| | (2) 374 | 374 | 515 |
| | (3) 395.3 | 447.5 | 551.9 to 635.7 |

(1) Short-line distances.

(2) Docket No. 28300 distances.

(3) Fort Worth and Denver Railway direct to Houston and Galveston, and in connection with other carriers to Corpus Christi.

(4) Santa Fe lines direct to Houston and Galveston, and in connection with other lines to Corpus Christi.

[8] *Class Rates Investigation, 1939*, 262 I.C.C. 447, and supplemental reports.

We have used distances on different bases as determinative of particular issues, depending upon the evidence presented and the intended use of the distances. In relating export rates, distance is an important factor; however, equal rates have been required to related ports even where there have been substantial differences in distances. See *Hillsborough County Port Authority* v. *Ahnapee & W. Ry.*, 313 I.C.C. 691, affirmed *per curiam, sub nom, Alabama, T. & N. R. Co.* v. *United States,* 207 F. Supp. 638. In the instant proceedings, the docket No. 28300 distances, as noted in the above table, are about the same as the short-line distances from the various origins to Houston and Corpus Christi, and they are about 48 miles less than the short-line distance to Galveston. Omitting the origins in southeastern Oklahoma and northeastern Texas, hereinafter considered, the docket No. 28300 distances from the other origins from which different rates are still maintained to Corpus Christi exceed those to Houston by from approximately 120 to 160 miles, or from 20 percent on the longer hauls to 60 percent on the shorter hauls. Such ranges in distances have existed in prior proceedings from substantially the same origins to the same Texas ports, *Export Grain from Texas to Texas Points, supra, Nueces County Nav. Dist. No. 1* v. *Atchison, T. & S. F. Ry. Co.*, 315 I.C.C. 155, and *Nueces County Nav. District No. 1* v. *Abilene & S. Ry. Co., supra,* and equal rates have been required. No different conclusion is warranted in the instant proceedings. Transportation conditions are substantially the same from points of origin, although the distances are slightly more to Corpus Christi. The assailed rates appear to exercise so drastic an influence as to require port equalization.

The examiner found that the rates assailed are unduly prejudicial to the port of Corpus Christi and unduly preferential of Galveston and Houston, as in the proceedings cited next above. However, as noted, the complaints have been dismissed as to the Texas & Pacific and three other railroads upon the request of the complainants, although such railroads did not equalize their rates from stations

east of Fort Worth to Corpus Christi with those to Houston and Galveston. Dallas, Denton, and Marshall, Tex., are in this group, and, as noted in the appendix, the rates are higher to Corpus Christi than to the other two ports. The complainants have indicated that the action of the Texas & Pacific satisfied the complaints. Numerous origins on the Texas & Pacific east of Fort Worth are also served by other defendants, and no reason appears for requiring the other defendants to establish equal rates from these points to the three Texas ports. Moreover, the principal production of cotton in Oklahoma is shown to be in the western part, only two counties, Bryan (Durant, Okla.) and Muskogee, having any substantial production in the eastern part. Bryan County is a part of the same production area as the Texas origins east of Fort Worth, and should be treated the same ratewise. Traffic from Muskogee County to Corpus Christi could be transported through the eastern Texas and Bryan County production area, and rates to Corpus Christi on the Houston-Galveston level could cause higher rates to intermediate than to more distant points over the same line or route. Thus, the defendants will be expected to grade their rates to avoid violating the fourth-section principles.

The examiner found that the transit arrangements in connection with the assailed rates are less favorable to Corpus Christi than to Galveston and Houston, and that Corpus Christi was therefore unduly prejudiced in that respect also. However, the evidence indicates that there is now substantial equality in the transit services permitted on export cotton over existing routes to the gulf ports. The existing arrangements should be continued in connection with the rates required herein.

We find that the assailed rates on export cotton from origins in New Mexico on and east of the line of the Santa Fe Railway system extending from El Paso, Tex., to Trinidad, Colo., those in Texas on and north of the line of the Texas and Pacific Railway Company from El Paso to Fort Worth, Tex., and on and west of the Gulf, Colorado and

Santa Fe Railway from Fort Worth to Thackerville, Okla., and those in Oklahoma, except in Bryan County, to the port of Corpus Christi, Tex., are and for the future will be, unduly prejudicial to that port and unduly preferential of the ports of Houston and Galveston, Tex., to the extent that the rates to Corpus Christi exceed the corresponding rates to the latter ports.

COMMISSIONER FREAS, dissenting in part:

I disagree with the finding of undue preference and prejudice. To support such a finding it must be established that transportation conditions at the allegedly preferred and prejudiced points are substantially similar. As I see it, they are not.

---

*It is ordered,* That the defendants named in the complaints, to the extent that they participate in the transportation, be, and they are hereby, notified and required to cease and desist on or before July 26, 1965, and thereafter to abstain, from practicing the undue prejudice and preference found herein to exist.

*It is further ordered,* That said defendants, according as they participate in the transportation, be, and they are hereby notified and required to establish, on or before July 26, 1965, upon not less than 30 days' notice to this Commission and to the general public by filing and posting in the manner prescribed under section 6 of the Interstate Commerce Act, and thereafter to maintain and apply rates which will prevent and avoid the undue preference and prejudice found herein to exist.

*And it is further ordered,* That this order shall continue in force until the further order of the Commission.

By the Commission, division 2.

BERTHA F. ARMES,
*Acting Secretary.*

(SEAL)

## APPENDIX

*Representative rail export rates on cotton in effect October 29, 1964, with the docket No. 28300 distances**

| From— | To— Corpus Christi, Tex. Distance | Col. 1 | Col. 2 | Col. 3 | To— Houston-Galveston, Tex. Distance | Col. 1 | Col. 2 | Col. 3 |
|---|---|---|---|---|---|---|---|---|
| | Miles | Cents | Cents | Cents | Miles | Cents | Cents | Cents |
| New Mexico: | | | | | | | | |
| Clovis | 735 | 111 | 100 | 92 | 614 | 99 | 89 | 80 |
| Carlsbad | 735 | 117 | 107 | 99 | 614 | 105 | 93 | 85 |
| Las Cruces | 500 | 111 | 100 | 92 | 860 | 111 | 100 | 92 |
| Lovington | 710 | 102 | 91 | 83 | 589 | 102 | 91 | 83 |
| Portales | 735 | 111 | 100 | 92 | 614 | 99 | 89 | 80 |
| Roswell | 735 | 117 | 107 | 99 | 637 | 105 | 93 | 85 |
| Oklahoma: | | | | | | | | |
| Altus | 592 | 116 | 105 | 98 | 451 | 80 | 69 | 59.5 |
| Durant | 499 | 107 | 96 | 88 | 336 | 70 | 59.5 | 52.5 |
| El Reno | 611 | 116 | 105 | 98 | 470 | 80 | 69 | 59.5 |
| Guthrie | 638 | 116 | 105 | 98 | 479 | 90 | 79 | 70 |
| Muskogee | 636 | 116 | 105 | 98 | 473 | 80 | 69 | 59.5 |
| Tulsa | 682 | 121 | 110 | 103 | 518 | 90 | 79 | 70 |
| Texas: | | | | | | | | |
| Abilene | 500 (1) | 75 | 64.5 | 57.5 | 379 | 70 | 59.5 | 52.5 |
| | (2) | 70 | 59.5 | 52.5 | | 70 | 59.5 | 52.5 |
| Childress | 622 | 84.5 | 73.5 | 63.5 | 480 | 79.5 | 68.5 | 58.5 |
| Dallas | 415 (2) | 76 | 67 | 57.5 | 261 | 54.5 | 44.5 | 38.5 |
| | (1) | 59.5 | 49.5 | 43.5 | | 54.5 | 44.5 | 38.5 |
| Denton | 437 | 63.5 | 55.5 | 46.5 | 281 | 58.5 | 50.5 | 41.5 |
| Dimmit | 736 | 90.5 | 79.5 | 69.5 | 615 | 85.5 | 74.5 | 64.5 |

| From— | To Corpus Christi, Tex. | | | | To Houston-Galveston, Tex. | | | |
|---|---|---|---|---|---|---|---|---|
| | Distance | Col. 1 | Col. 2 | Col. 3 | Distance | Col. 1 | Col. 2 | Col. 3 |
| | Miles | Cents | Cents | Cents | Miles | Cents | Cents | Cents |
| El Paso .. | 756 | 111 | 100 | 92 | 816 | 111 | 100 | 92 |
| Fort Worth | 415 (1) | 59.5 | 49.5 | 43.5 | 261 | 54.5 | 44.5 | 38.5 |
| | (2) | 54.5 | 44.5 | 38.5 | | 54.5 | 44.5 | 38.5 |
| Lamesa .. | 678 | 84.5 | 73.5 | 63.5 | 561 | 79.5 | 68.5 | 58.5 |
| Littlefield | 683 | 84.5 | 73.5 | 63.5 | 561 | 79.5 | 68.5 | 58.5 |
| Lubbock | 646 | 84.5 | 73.5 | 63.5 | 525 | 79.5 | 68.5 | 58.5 |
| Marshall .. | 462 | 80 | 69 | 59.5 | 255 | 54.5 | 44.5 | 38.5 |
| Pecos ..... | 729 (2) | 97 | 85 | 77 | 608 | 97 | 85 | 77 |
| | (3) | 108 | 98 | 90 | | 105 | 93 | 85 |
| Sherman .. | 470 | 68.5 | 59.5 | 49.5 | 307 | 63.5 | 54.5 | 44.5 |
| Seymour .. | 567 | 75 | 64.5 | 57.5 | 426 | 70 | 59.5 | 52.5 |
| Sweetwater | 530 (1) | 76 | 65.5 | 58.5 | 409 | 71 | 60.5 | 53.5 |
| | (2) | 71 | 60.5 | 53.5 | | 71 | 60.5 | 53.5 |
| Wichita Falls .... | 515 | 75 | 64.5 | 57.5 | 374 | 70 | 59.5 | 52.5 |

Col. 1—Minimum 25,000 pounds.
Col. 2—Minimum 50,000 pounds.
Col. 3—Minimum 65,000 pounds.
(1) Defendants other than Texas & Pacific and associated lines.
(2) Texas & Pacific and associated lines.
(3) Panhandle & Santa Fe only.

* *Class Rate Investigation, 1939,* 262 I.C.C. 447, and later reports.

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In the

# Supreme Court of the United States

OCTOBER TERM, 1966

No. 827

CITY OF GALVESTON AND THE BOARD OF TRUSTEES OF THE GALVESTON WHARVES, et al.,

*Appellants,*

*v.*

UNITED STATES OF AMERICA, et al.

No. 828

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,

*Appellants,*

*v.*

UNITED STATES OF AMERICA, et al.

*On appeal from the United States District Court for the Southern District of Texas*

## MOTION TO AFFIRM

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Date: January 31, 1967.

WARLICK PRESS, INC.—2343 VALDINA STREET—DALLAS—HE 1-3130

I.

# TABLE OF CONTENTS


| | Page |
|---|---|
| No substantial question is presented | 2 |
| Geographical location of ports | 2 |
| Rate relationship | 6 |
| Rate history | 7 |
| Corpus Christi is unduly prejudiced | 9 |
| Commission followed long-established policy | 10 |

Page

Class Rate Investigation, 1939, 262 I.C.C. 447 ..... 5

Galveston Commercial Assn. v. G.H. & S.A. Ry., 100 I.C.C. 110 ..... 12

Nueces County Navigation Dist. No. 1 v. A. & S. Ry., 155 I.C.C. 712 ..... 12

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*Appellants,*

*v.*

UNITED STATES OF AMERICA, et al.

---

*On appeal from the United States District Court for the Southern District of Texas*

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## MOTION TO AFFIRM

---

The Nueces County Navigation District No. 1 and Gulf Compress, interveners on behalf of Defendants in the Court below, submit this motion to affirm the unanimous decision and order of the three-judge Court, handed down at Houston, Texas, August 11, 1966. (Appendix, pages 1 and 11).[1]

[1] Refers to jurisdictional statements by Galveston, et al., and AT&SF Railway, et al.

## NO SUBSTANTIAL QUESTION IS PRESENTED

The jurisdictional statement by the City of Galveston, et al., presents five questions, while the statement by the A.T.&S.F. Ry., et al, presents eight questions. The questions presented in each statement deal with the same issues and are based on erroneous constructions of findings by the Interstate Commerce Commission and the trial Court. They are too insubstantial to require consideration by this Court.

## GEOGRAPHICAL LOCATION OF PORTS

Both jurisdictional statements assume that the decisions of the Commission and the lower Court deprive Galveston and Houston of the benefit of their geographical locations so far as the cotton produced in the origin territory is concerned. Galveston is the principal cotton port of the United States (*Witnesses Boehl* and *Gallagher*). During the last four years reported in the I.C.C. record the annual average cotton exported through Galveston, Houston and Corpus Christi is shown below:

| *Port of Export* | *Bales* | *Percent* |
|---|---|---|
| Galveston | 1,719,239 | 55.4 |
| Houston | 1,019,929 | 32.8 |
| Corpus Christi | 366,995 | 11.8 |

The Commission so found (Appendix 17) and that finding was based on uncontroverted testimony (*Witness Williams*, Exhibit 18).

Galveston is the oldest of the three ports. Galveston was *the Texas port* prior to the Civil War. Houston recently

celebrated its fiftieth anniversary. The Port of Corpus Christi was opened in 1926 (R. 18).[2]

The production of cotton in the origin territory involved in the Commission complaint is very substantial. The territory is shown on Map Exhibit 8 of the Commission record, Exhibit 2. It is North Texas on and north of the Texas & Pacific Railroad shown on that map, all of Oklahoma and eastern New Mexico. Approximately 25 per cent of all cotton produced in the United States is produced in that area (App. 16). The average annual production in bales is shown in each county. In counties where no figures are shown there is no production.

Map Ex. 8 is drawn to scale. One inch on the map equals 62½ miles; 1.6 inches equal 100 miles (I.C.C. record, Exhibit 2, page 191). If you place a ruler on that map you will find that the area in red is ½ inch closer to Corpus Christi than to Galveston. Geographically, the main cotton producing area is closer to Corpus Christi than to Galveston.

The average number of bales produced in the origin area during the years 1962 and 1963 is shown below:

| | |
|---|---|
| Northern Texas | 3,123,753 bales |
| Oklahoma | 278,858 bales |
| Eastern New Mexico | 199,430 bales |

The production in northern Texas is about 80 per cent of the State's total production. Mere than 50 per cent of the State's total production is produced in the ten counties outlined in red on Map Exhibit 8 (Appendix 16 and 17).

[2] See transcript of testimony before Interstate Commerce Commission in Exhibit 2 of the I.C.C. record (R. 18).

The foregoing findings were based on facts presented by *Witness Jamison* (I.C.C. Exhibit 9 and R. 192) and *Witness Broxterman* (I.C.C. Exhibit B-1, Corrected).

The average weighted highway distances, based on the 1962-63 production, from the involved origin area to Galveston and Corpus Christi are as follows:

| | *Highway Distances (Miles) to* | |
|---|---|---|
| *From* | *Corpus Christi* | *Galveston* |
| Texas | 537 | 559 |
| Oklahoma | 578 | 530 |
| New Mexico | 667 | 737 |
| Total average | 547 | 567 |

The railroads do not run direct from the principal cotton producing area to Corpus Christi and the weighted average distances via railroads are as follows:

| | *Railroad Distances (Miles) to* | |
|---|---|---|
| *From* | *Corpus Christi* | *Galveston* |
| Texas | 648 | 581 |
| Oklahoma | 613 | 516 |
| New Mexico | 811 | 796 |
| Total average | 654 | 588 |

The average rail short-line distance to Corpus Christi exceeds the rail distance to Galveston by 10.1 per cent. (*Witness Jamison*, Exhibit 10 and R. 194).

The Commission cited the railroad distances (Appendix 22) but it did not specifically mention the highway distances. However, it found that the distances "are slightly more to Corpus Christi" (Appendix 23), evidently referring to railroad distances. Highway distances are 20 miles longer to Galveston than to Corpus Christi.

The Docket 28300 distances shown in an appendix to the Commission's decision (Appendix 26 and 27) are rate bases calculated and published by the railroads in response to the order in *Class Rate Investigation*, 1939, 262 I.C.C. 447. They are based on groups at origin and destination. They do not purport to reflect the actual distances to Galveston. As stated by the Commission:

> "the docket No. 28300 distances, as noted in the above table, are about the same as the short-line distances from the various origins to Houston and Corpus Christi, and they are about 48 miles less than the short-line distance to Galveston" (Appendix 23).

If the extra 48 miles are added to the Docket 28300 distances shown on Appendix 26 and 27, the distances to Corpus Christi from the origins there shown will be found to average 13.3 per cent greater than the distances to Galveston. But the average weighted distances shown in *Witness Jamison's* Exhibit 10 before the Commission more nearly reflect the actual service performed by the railroads.

Both jurisdictional statements refer on page 5 to the finding (Appendix 23) that the Docket 28300 distances to Corpus Christi exceed those distances to Houston by "from approximately 120 to 160 miles, or from 20 percent on the longer hauls to 60 percent on the shorter hauls." Galveston is the primary cotton port which sets the competitive rates and the distances to Galveston are 48 miles farther.

Geographically, Corpus Christi is 20 miles nearer than Galveston to the cotton producing counties in the origin area here involved. Based on the actual railroad mileages via circuitous routes to Corpus Christi, it is 10.1 per cent

farther than Galveston. Galveston has no geographical advantage over Corpus Christi and the rates should be the same to both ports.

## RATE RELATIONSHIP

At the time the complaint was filed, rates from the stations shown on pages 26 and 27 of both Jurisdictional Statements were considerably higher to Corpus Christi than to Galveston. As stated by the Commission (Appendix 16), the Texas & Pacific and associated railroads voluntarily reduced the rates to Corpus Christi after the evidence was in. Rates from those origins are now the same as the rates to Galveston when shipments move via the Texas & Pacific Ry. From those origins via other routes and from all other origins, the rates to Corpus Christi are shown to be very much higher than the rates to Galveston. Many of those rates were reduced, effective October 28, 1964, so that they are only 5 cents per 100 lbs. higher than the rates to Galveston (Appendix 16). But that results in a 25 cent penalty for the privilege of using the Port of Corpus Christi. Since the steamship rates are the same from Corpus Christi as from Galveston (Appendix 16), cotton will not move via the Port of Corpus Christi if the inland rail rates are higher to that port than to Galveston.

Appendix D of the Galveston statement is erroneous because it assumes that the distances there shown reflect the actual distances. The distances to Galveston there shown should be increased 48 miles in each instance. That will change the class rates to Galveston shown in Col. 6 and the percentage relations shown in Columns 8 and 9.

The testimony of all witnesses before the Commission showed that the rates on export cotton at the time of the hearing from the involved origin territory to Corpus Christi were very much higher than to Galveston and in many instances they were higher than to New Orleans. See testimony of *Witness Jamison*, beginning at page 197, and his exhibits 12, 13 and 14, included in Commission record Exhibit No. 2. There was no controverting testimony.

## RATE HISTORY

Prior to the 1930-31 cotton season, the rates on cotton from the Texas origins herein involved were identically the same to Galveston, Houston and Corpus Christi (*Witness Jamison*, pages 1 and 2, verified statement in Commission record Exhibit 1). During the season 1930-31, the movement of cotton by highway increased to such a volume that it constituted a serious menace to the traffic and revenues of the rail carriers. After two efforts, four railroads (one of which serves Corpus Christi) published reduced rail rates on cotton, effective August 7, 1933, but they applied only to Galveston, Houston and Texas City (*Witness Altgilbers*, pages 3 and 4, verified statement in Commission record Exhibit 1).

*Witness Altgilbers* further testified for Defendants before the Commission that the truck rate from Lubbock to Corpus Christi at the time of the hearing was $2.85 per bale, compared with a rate of $2.925 per bale to Houston. See pages 22 and 23 of his verified statement. During the five years immediately preceding the Commission hearing,

94,049 bales per annum moved from the complaint origin area to Corpus Christi. Less than 5,000 bales moved by rail. The remainder moved via trucks. See Exhibits 4, 7 and 11 of Commission record Exhibit 1. The amount of cotton that moved from this origin area to Galveston and Houston is not shown in the record but the record is clear that the railroads encountered as much competition from the highways to Corpus Christi as they did to Galveston and Houston.

The Commission made the following findings as to motor truck competition at Corpus Christi:

> "There is motor competition for the cotton traffic from origins in the considered area to Corpus Christi". * * * "During the last 4 years, an average of over 100,000 bales of cotton from the origin area involved herein were exported through Corpus Christi and during the last 2 years all of this cotton moved by truck." * * * "Since that time (1961) all movements from the complaint area have been by truck." (Appendix, pages 17 and 18.)

Neither the Appellants nor the intervening railroads offered any evidence before the Commission showing that there is any more motor truck competition to Galveston and Houston than to Corpus Christi. In fact, they failed to show how much cotton from the origin area actually moved by truck.

Based on uncontroverted evidence (*Witness Jamison*, R. 200-204, Commission record, Exhibit 2) the Commission found that the transportation conditions are substantially the same from points of origin to Galveston, Houston, Texas City and Corpus Christi (Appendix 23). The distances to Corpus Christi are "slightly more", 10.1 per cent greater than to

Galveston via rail routes. However, the highway distance to Corpus Christi is less than to Galveston and the basis for the reduced rates to Galveston was the highway competition.

As found by the Commission (Appendix 19), the railroad rates were further reduced an average of 10 cents per 100 pounds, effective September 17, 1963. This had the effect of diverting cotton from trucks to rails. Since the rail rates after that date were lower to Galveston and Houston, the rail shipments moved to those ports rather than to Corpus Christi. The 1963 reduction was accomplished by a so-called allowance system which is still under investigation by the Interstate Commerce Commission. The allowances are still in effect at this writing.

## CORPUS CHRISTI IS UNDULY PREJUDICED

The disparity in rates shown in the Commission's findings are causing serious damage to the Port of Corpus Christi and the Gulf Compress. So long as cotton could move by truck from this origin area to Corpus Christi there was a considerable movement of export cotton through that port. *Witness Grevelle* testified for the Gulf Compress that as soon as the truck allowance, referred to in the previous section, became effective, it "just the same thing as killed it (the movement). It is just dead." He estimated that his losses because of that fact would amount to $200,000 per year. See R. 160, Commission record, Exhibit 2.

The Commission found that cotton would not move from the origin area to Corpus Christi at the rail rates resulting from the 10 cent allowance (50 cents per bale) and that

the assailed rates from origins other than those in several counties in north east Texas and eastern Oklahoma are and for the future will be unduly prejudicial to Corpus Christi and unduly preferential to Galveston and Houston. See Appendix, pages 19, 24 and 25.

There is no question about the sufficiency of the Commission's finding as to undue prejudice and it was based on substantial and uncontroverted evidence as to injury and damage.

## COMMISSION FOLLOWED LONG-ESTABLISHED POLICY

Appellants say that this Court should make it clear that questions of preference and prejudice among ports are to be decided on the facts of record but they have failed to point out the facts in the Commission's record that are contrary to its findings. Among many findings the following significant findings appear in the decision:

1. Rates to Corpus Christi exceed the rates to Galveston and Houston by as much as 38½ cents per 100 lbs. Appendix 26-27.
2. Ocean rates from the three ports are the same. Appendix 16.
3. After the hearing, four of the 27 defendants equalized rates to Corpus Christi from their origins. Appendix 16.
4. Corpus Christi has adequate facilities for cotton. Appendix 16.

5. Origin area is an important cotton producing area. Appendix 16, 17.

6. Galveston is the most important cotton port. Appendix 17.

7. More than 100,000 bales from the origin area has moved annually to Corpus Christi. Appendix 18.

8. Amount trucked to Galveston and Houston not shown. Appendix 18.

9. Lower rates to competing ports are on a motor competitive level. Appendix 19.

10. Corpus Christi can not attract cotton on rates higher than to Galveston and Houston. Appendix 20.

11. General terrain of the territory is the same to all three ports. Appendix 21.

12. Docket 28300 distances to Galveston (shown on pages 26 and 27 of Appendix) are about 48 miles less than actual distances. Appendix 23.

13. Transportation conditions to all three ports are the same but the rail distances to Corpus Christi are slightly more. Appendix 23.

14. Assailed rates are unduly prejudicial to Corpus Christi. Appendix 24, 25.

The Commission's findings are amply supported by the evidence and they are adequate to sustain the Commission's order. It acted within the scope of its authority. It did not abuse its discretion. The trial Court correctly stated its duty in cases of this kind (Appendix 2 and 3) and its decision and order are amply supported by the Commission record.

The Commission has always recognized the fact that a port of export is merely a transfer point on one of several competing routes between origins in the United States and

destinations in foreign countries. When steamship rates from competing ports to foreign destinations are the same, as in this case, export shipments to such destinations will not move through ports which do not enjoy the same inland rates that apply to competing ports. More than forty years ago the Commission held that competing ports should be grouped for rate making purposes in so far as export and import traffic is concerned. It said:

> "Grouping is generally more justifiable and has been more extensively employed in making rates on export and import traffic than on domestic traffic." *Galveston Commercial Association v. G. H. & S. A. Ry.*, 100 I.C.C. 110, 122 (1925).

On further consideration in that case the Commission issued orders requiring that the grouping of New Orleans and Galveston should be limited to situations where the distance to one port does not exceed the distance to the more favored port by more than 25 per cent. Beyond the 25 per cent range differential rates were prescribed. *Galveston Commercial Association v. G. H. & S. A. Ry.*, 128 I.C.C. 349, 388, and 160 I.C.C. 345, 359.[1]

Appellants contend that there is a conflict between the decision of the Commission in this case and the decision in *Nueces County Navigation District No. 1 v. Abilene & Southern Ry.*, 155 I.C.C. 712 (1929). The District Court considered that contention and dismissed it with a foot note (Appendix, page 9) indicating that conditions have changed since that decision. We call attention to the fact that the

[1] This case was reversed on other grounds in *Texas & Pacific Railway Co. v. United States*, 289 U.S. 627 (1933) but the 25 per cent figure was not in question.

origin territory in that case was quite different from the origin territory involved in the Commission's order here under consideration.

The complaint in the foregoing case was filed October 22, 1927, and included Arkansas, Louisiana and all of Texas. The record showed that the heavy producing territory at that time was in Eastern Texas, Arkansas and Louisiana and the Commission found:

> "The port of Corpus Christi is more remote from the heavy cotton-producing territory than the other Texas ports" (716).

The order in that case was vacated July 24, 1940, and is no longer in existence. The complaint in the case now under consideration included north Texas but the Commission's order applied only to that portion of north Texas lying west of Fort Worth. The entire northeastern section of north Texas was excluded from the order. Arkansas and Louisiana origins were not involved.

Today the main production of cotton in Texas is in the red area indicated on Map Exhibit 8 (Commission record Exhibit 2). As shown in that map, cotton production in eastern Texas has almost ceased. Less than 500 bales are ginned in many east Texas counties. As the District Court stated, "Much has happened since then" (Appendix 9).

In disposing of this case, the Commission has followed a long-standing policy concerning port relationships. The District Court unanimously approved the results, though it might have used different language in some cases if it had been

writing the decision. However, as stated (Appendix 1 through 4), that is not the function of the Courts.

WHEREFORE, we respectfully ask that the decision and order of the District Court be in all things affirmed.

Respectfully submitted,

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# In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 827

CITY OF GALVESTON AND THE BOARD OF TRUSTEES OF THE GALVESTON WHARVES, ET AL., APPELLANTS

*v.*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

No. 828

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., APPELLANTS

*v.*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS*

## MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed. The Secretary of Agriculture, who participated below, joins in the motion.



245-509—67

## STATEMENT

These cases are direct appeals from a judgment of a three-judge district court (J.S. App. 11)[1] dismissing two suits brought to set aside the same order of the Interstate Commerce Commission (J.S. App. 13–27). The Commission's order requires 26 railroads transporting cotton for export from Northern Texas and portions of Oklahoma and Eastern New Mexico to end an unlawful preference of the ports of Galveston and Houston in their rates which prejudices the port of Corpus Christi, Texas. Four of the railroads sought to set aside the Commission order in the district court and now appeal to this Court.

The ports of Corpus Christi, Galveston and Houston compete for the export cotton traffic here involved. Ocean rates for the cotton shipped from the three ports are the same. Rail rates, however, from interior points to these ports are the same only for Houston and Galveston. Higher rail rates are charged for Corpus Christi.

The principal origin area of the cotton shipped through these ports is in Northern Texas. Lubbock is the hub of the area.[2] The shortest rail route from Lubbock to Corpus Christi is 646 miles. Houston is

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[1] "J.S. App." refers to the appendix pages of the jurisdictional statements in both No. 827 and No. 828, which reproduce both the opinion and judgment of the district court and the report and order of the Commission on identical pages.

[2] Of the 1,000,041 bales of cotton produced in the origin area involved in this proceeding in 1962–63, nearly 90 percent was produced in Northern Texas (J.S. App. 16). More than 50 percent of all Texas cotton is "grown in the 10 counties of which Lubbock is the hub" (J.S. App. 17).

the closest of the three ports to Lubbock. Galveston is 45 miles farther than Houston, and Corpus Christi is an additional 67 miles beyond Galveston (J.S. App. 9, 22).

Notwithstanding the difference in distance between Galveston and Houston, the appellant roads charge the same rates to these ports but higher rates to Corpus Christi. They produced no cost or other evidence to explain the identity of rates to Galveston and Houston, despite the difference in distance, and the rate differential to Corpus Christi. The roads which have appealed serve Galveston and Houston but do not serve Corpus Christi directly. They fear that an extension of the Galveston and Houston rates to Corpus Christi will result in a loss of revenue to them because some of their traffic is likely to be diverted to Corpus Christi, and on this traffic they would have to divide their revenues with the lines that serve Corpus Christi directly (J.S. App. 19).

The Commission held that the rates were unduly prejudicial to Corpus Christi and unduly preferential to Houston and Galveston, in violation of Section 3(1) of the Interstate Commerce Act.[1] It found that the

[1] Section 3(1), 49 U.S.C. 3(1), provides:

"It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any

rate disparity appears to have exercised "so drastic an influence" on the traffic to Corpus Christi that this port "cannot expect to attract the rail movements of export cotton from the considered origins with higher rates than Galveston and Houston" (J.A. App. 20, 23). It further found that the transportation conditions to Corpus Christi were substantially similar to those to Galveston and Houston: the general terrain over which the railroads operate to the three ports is the same (J.S. App. 21); there is motor carrier competition on traffic to Corpus Christi as well as to Galveston and Houston (*ibid.*); and, while distance is an important factor, the difference in distance alone was not sufficient to justify a higher rate, especially since the three ports have been equalized on other commodities from substantially the same origins (J.S. App. 23).[4]

The district court sustained the Commission's decision, rejecting appellants' argument that no prejudice to Corpus Christi could be shown because the rates per mile were no higher than to the other ports (J.S. App. 5-6). It held that the Commission might lawfully consider other transportation conditions besides the relative mileage from the origin area (J.S. App. 7). Noting that the difference in distance between Corpus Christi and Galveston is 67 miles and that the

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respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description. * * *"

[4] One Commissioner dissented, stating, without further elaboration, that he believed that the "transportation conditions * * * are [not] substantially similar" (J.S. App. 26).

railroads have already disregarded the 45 miles between Galveston and Houston "so [that] the required equalization here is an additional 22 mile difference on a 646 mile haul," the court ruled that the Commission's conclusion "was well within its 'broad discretion * * * to accommodate the factors of transportation conditions, distance and competition'" (J.S. App. 9–10).

## ARGUMENT

These appeals do not warrant plenary consideration. The judgment below is correct and should be affirmed.

1. The essence of appellants' position is that the Commission may not compel them to disregard a difference in distance; therefore, since the distance to Corpus Christi is greater than to Houston and Galveston, they have a right to charge higher rates. However, there is no rule that requires the Commission to consider distance to the exclusion of all other factors. Here, as in *Ayrshire Corp.* v. *United States*, 335 U.S. 573, 588, the Commission properly "did not rely strictly upon distance. Distance was a factor but it was not controlling"—for the following reasons:

a. Appellant lines charge the same rates to Galveston as to Houston although Galveston is farther from the area of origin. The additional distance to Corpus Christi is only slightly greater.[5] This sug-

[5] Corpus Christi is only slightly more circuitous (circuity being the percentage that one distance is greater than another) than Houston-Galveston from the origin territory—less than 25 percent on the average (the total of the percentages in col-

gests that the distance factor is not so substantial in the present case to compel a rate differential.

b. Equivalent differences have been disregarded in recent grain rate cases involving substantially the same points.

The district court's refusal to set aside the Commission's order was thus soundly based on an application of the well settled principle that Congress did

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umn (8) of the table on App. 29 to J.S. No. 827 for all three States divided by the number of representative points listed in column (1)). The weighted average circuity for Corpus Christi as compared to Houston-Galveston (total of the distances in column (2) for all 3 States divided by the total of column (5)) is less than 22 percent.

The Commission was aware that the Docket No. 28300 distances to Corpus Christi from the origin area ranged from 20 percent to 60 percent greater than to Houston-Galveston. But it found persuasive the fact that even though this method of measure resulted in the greatest mileage differences, the same range had been present in recent grain rate cases (see note 6, *supra*) where it had required equalization (J.S. App. 23). As a practical matter, the upper limit of this range (60 percent) referred to the distances from an area surrounding only one point of origin, Fort Worth, Texas.

On two occasions the Commission has found that rates on grain and grain products from Oklahoma, New Mexico, and northern Texas to Corpus Christi for export are unduly prejudicial to that port when higher than corresponding rates to other Texas ports, such as Houston and Galveston. *Nueces County Navigation Dist. No. 1 v. Atchison, T. & S.F. Ry. Co.*, 313 I.C.C. 153 (1961) (involving origins in all three States); *Export Grain from Texas to Texas Points*, 319 I.C.C. 16 (1963) (involving origins in Oklahoma and northern Texas). The Commission stated in the latter proceeding, "The history of the rate adjustment on export shipments of grain and grain products to the Texas ports indicates that substantial differences in distance have long been and are now being disregarded generally on this traffic, especially to the Houston-Galveston-Port Arthur group" (at 28).

"not attempt to define an unlawful discrimination with mathematical precision" (*United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344, 352), but left the determination primarily to the Commission, "based upon an appreciation of all the facts and circumstances affecting the traffic" (*New York* v. *United States*, 331 U.S. 284, 347). Having found that there was a rational basis for the Commission's accommodation of the "factors of transportation conditions, distance and competition" (*Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573, 593), the court properly refused to substitute its judgment for that of the Commission (*United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 536).

2. Appellants urge that while the carriers may voluntarily equalize rates in some circumstances, in spite of distance differences (see *City of Wilmington* v. *Alabama, G.S. Ry. Co.*, 316 I.C.C. 709 (1962)), the Commission is without authority to compel them to do so in the same circumstances (J.S. 827, p. 20; J.S. 828, p. 9, n. 3). Such a distinction was rejected by this Court at least forty years ago in *United States* v. *Illinois Central R.R.*, 263 U.S. 515, 523–525. It may be to the advantage of appellant lines, since they do not serve Corpus Christi directly, to maintain the higher rates to Corpus Christi and thus to prevent a diversion of some of this traffic to lines with which they might have to share the revenues. This factor, however, does not preclude a finding of unjust discrimination. Cf. *id.* at 525.

## CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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# In the Supreme Court of the United States

OCTOBER TERM, 1966

**CITY OF GALVESTON AND THE BOARD OF TRUSTEES OF THE GALVESTON WHARVES, ET AL.,**
*Appellants,*

v.

**UNITED STATES OF AMERICA, ET AL.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

## BRIEF OF APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM

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## CONTENTS


| | PAGE |
|---|---|
| Argument | 2 |
| Conclusion | 10 |


## CITATIONS

### *Cases*


| | |
|---|---|
| American Round Bale Press Co. v. A., T. & S. F. Ry. Co., 32 I.C.C. 458 (1914) | 5 |
| Automobiles to Southern Ports for Export, 216 I.C.C. 113 (1936) | 2 |
| Ayrshire Corp. v. United States, 335 U.S. 573 | 4 |
| Baltimore & O. R. Co. v. Boston & M. R. Co., 373 U.S. 372 | 3 |
| Burlington Truck Lines v. United States, 371 U.S. 156 | 9 |
| City of Wilmington v. Alabama G. S. R. Co., 316 I.C.C. 709 (1962) | 4 |
| Interstate Commerce Comm'n v. Diffenbaugh, 222 U.S. 42 | 2 |
| Interstate Commerce Comm'n v. Union Pacific R.R., 222 U.S. 541 | 5 |
| Labor Board v. Metropolitan Ins. Co., 380 U.S. 438 | 9 |
| Larabee Flour Mills Co. v. Chicago, B. & Q. R. Co., 223 I.C.C. 55 (1937) | 5 |
| Maritime Asso., Boston Chamber of Commerce, v. A.A.R.R. Co., 95 I.C.C. 539 (1925) | 5 |
| Nueces County Nav. Dist. v. Abilene & S. Ry. Co., 155 I.C.C. 712 (1929) | 7 |

PAGE

Procter & Gamble Co. v. Alton & S.R., 183 I.C.C. 365 (1932) .. 5

Securities & Exchange Comm'n v. Chenery Corp., 318 U.S. 80; 332 U.S. 194 ..... 9

Southern Pacific Co. v. Interstate Commerce Comm'n, 219 U.S. 433 ..... 6

Texas & Pacific Ry. Co. v. United States, 289 U.S. 627 ..... 9

United States v. Illinois Central R.R., 263 U.S. 515 ..... 2, 5

Vegetables and Avocados, South to Official Territory, 269 I.C.C. 409 (1947) ..... 5

*Miscellaneous*

Brief for the United States, Supreme Court of the United States, Nos. 97, 98 and 99, O.T. 1962, Baltimore & O. R. Co. v. Boston & M. R. Co. ..... 3

# In the
# Supreme Court of the United States

OCTOBER TERM, 1966

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**CITY OF GALVESTON AND THE BOARD OF TRUSTEES OF THE GALVESTON WHARVES, ET AL.,**
*Appellants,*

v.

**UNITED STATES OF AMERICA, ET AL.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

## BRIEF OF APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM

Pursuant to rule 16(3), appellants submit this brief in opposition to the motion to affirm filed jointly by the United States, the Interstate Commerce Commission, and the Secretary of Agriculture (the Government) and to the motion to affirm filed jointly by Nueces County Navigation District No. 1 and Gulf Compress (Corpus Christi).

## ARGUMENT

### I.

1. The motions ignore the basic question presented (J.S., pp. 4, 8-15): whether a misalignment of rates, relative transportation services considered, is an essential element of undue preference and prejudice under section 3(1) of the Interstate Commerce Act. The Government's motion is an obvious attempt to divert the Court's attention from this issue. The Corpus Christi motion is little more than an attempt to offer a *post hoc* rationalization of the order on grounds on which the Commission did not rely in entering it.

The Government offers no theory upon which the assailed order can stand consistently with the cases in which the Commission has held that it cannot compel carriers to equalize rates to competing ports in disregard of substantial differences in distance or with this Court's opinions in *Interstate Commerce Comm'n* v. *Diffenbaugh*, 222 U.S. 42 and *United States* v. *Illinois Central R.R.*, 263 U.S. 515 (J.S., pp. 9-13). It is unable to point to a single test by which the assailed rates can be said to be prejudicial.[1]

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[1] For a particularly apt statement of the applicable legal principle, see *Automobiles to Southern Ports for Export*, 216 I.C.C. 113, 122 (1936), where the full Commission said:

> The principal north Atlantic United States port with which, the record indicates, the southern ports have been, or are likely to be, in competition for such traffic is New York. In view of the fact that the proposed rates to the southern ports are lower in level, distance considered, than the present rates to New York from the same origin points, we are unable to conclude that they would result in preference of New York and prejudice to southern ports.

There, as here, the rates to the allegedly prejudiced ports were higher in absolute amounts because of the longer distances, but were "lower in level, distance considered." If such rates were not prejudicial there, they are not prejudicial here. The Commission has no discretion to apply inconsistent legal standards of what constitutes "prejudice" and to do so is arbitrary.

Its argument merely comes down to the proposition that the rates are prejudicial simply because the Commission says they are.[2]

No one, the Commission, the District Court, or any appellee, has yet been able to answer the fundamental question: How can rates be adjudged to be "prejudicial" if they have not been shown to be improperly proportioned to the services rendered? If the Court should sustain the Commission's power to adjudge rates to be "prejudicial" in the absence of that element, it would be conferring on the Commission a wholly arbitrary power to compel the carriers to adopt any policy of ratemaking the Commission desires. It would also be conferring on the Commission the power to hold that the advantage of location is an undue preference and the power to equalize fortunes, opportunities, and abilities.

2. The motion of the Government does not deny, and the Corpus Christi motion admits (p. 13), that, in entering its order, the Commission was following a "policy" of port equalization. Such a policy is clearly contrary to the provisions of section 3(1) of the Act (J.S., pp. 18-21).

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[2] It is understandable why the Commission takes such a position, but the position of the United States seems to be in conflict with its position in *Baltimore & O. R. Co.* v. *Boston & M. R. Co.*, 373 U.S. 372. In that case (Nos. 97, 98, and 99, O.T. 1962) the brief for the United States (note 20, p. 36) said:

> In our view, each port, so far as practicable, should be given an opportunity to realize its own advantages, whether the advantage is a natural one (*e.g.*, location or the possession of a good harbor) or a commercial one (*e.g.*, the availability of frequent sailings). We would not endorse the view that rates should be designed to cancel out inherent advantages. Whether this was the Commission's design is not made clear by its report.

No attempt is made by the Government or by Corpus Christi to argue that such a policy is consistent with the requirements of the Act.

## II.

1. The Government's argument that the order is within the discretion of the Commission rests on two cases, *City of Wilmington* v. *Alabama G. S. R. Co.*, 316 I.C.C. 709 (1962) and *Ayrshire Corp.* v. *United States*, 335 U.S. 573, neither of which is pertinent to the present inquiry. *City of Wilmington* was a case in which carriers disregarded substantial differences in distance to voluntarily equalize ports and the question was whether the resulting prejudice was "undue." In *Ayrshire*, in referring (335 U.S. at 593) to the Commission's discretion "to accommodate the factors of transportation conditions, distance and competition," the Court was not referring to the tests by which the Commission found "prejudice" in the rates, but was referring to the Commission's power, having found undue prejudice (based, among other things, on a misalignment of rates) to remove that prejudice. In other words, the Court recognized that the Commission had broad discretion to say that though the prescribed rates might still be "prejudicial," they would not be "unduly" so. The Court clearly did not, by such language, intend to confer on the Commission a right to arbitrarily find the existence of prejudice in the absence of a misalignment of rates, relative transportation services considered.

Appellants do not question the Commission's broad discretion to determine whether prejudice (obvious, proven, or admitted) is "undue," but, as pointed out in our jurisdictional statement (p. 14), there is a vast difference between the two inquiries: (1) by what tests is a preferential and prejudicial relationship to be known, and (2)

on what grounds may such a relationship be deemed free from the prohibitions of the statute. Being unable to indicate any test by which the assailed rates may be found to be "prejudicial," the Government refuses to recognize the foregoing distinction and, therefore, in its attempt to rely on such cases as *City of Wilmington* and *Ayrshire*, it is forced into the untenable position that whatever the carriers may lawfully do voluntarily to meet competition, the Commission may compel them to do. The only citation of authority for its position, *United States* v. *Illinois Central R.R.*, 263 U.S. 515, 523-525, clearly does not support it; it refutes it.

Nowhere in its opinion in *Illinois Central* did the Court suggest that there was no distinction between what the carriers may lawfully do to meet competition and what the Commission may compel them to do. On the contrary, not only does the Court's reasoning clearly indicate the existence of such a distinction but its reliance (263 U.S. at 525) on *Interstate Commerce Comm'n* v. *Union Pacific R.R.*, 222 U.S. 541, 553, is explicit recognition of such a distinction. In *Union Pacific*, the Court said:

> "It is quite true that the carriers may do what they could not be compelled to do."[8]

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[8] There are many Commission cases recognizing such a distinction. Representative examples are *American Round Bale Press Co.* v. *A., T. & S. F. Ry. Co.*, 32 I.C.C. 458, 468 (1914); *Maritime Asso., Boston Chamber of Commerce* v. *A.A.R.R. Co.*, 95 I.C.C. 539, 565-566 (1925). *Procter & Gamble Co.* v. *Alton & S.R.*, 183 I.C.C. 365, 367 (1932); *Larabee Flour Mills Co.* v. *Chicago, B. & Q. R. Co.*, 223 I.C.C. 55, 63 (1937); *Vegetables and Avocados, South to Official Territory*, 269 I.C.C. 409, 411 (1947).

In *Illinois Central* the Court also pointed out the distinction between that case and *Southern Pacific Co.* v. *Interstate Commerce Comm'n*, 219 U.S. 433, where it was held that the Commission could not, under the guise of an order, proper in form, purporting to find existing rates unlawful, compel the railroads to adopt a different policy of ratemaking than they wished to follow. In *Illinois Central* there was a misalignment of rates, relative transportation services considered. The Court pointed out that "discrimination" was not denied and that the rates from the prejudiced point were higher than rates from competing points "for the same or longer distances." 263 U.S. at 521. Here there is no such misalignment. The situation here is similar to that in *Southern Pacific*. Here the Commission simply used a formal finding of unlawfulness as a device to compel the carriers to follow a policy of ratemaking that they do not wish to follow.

2. Since the Government's entire argument is based on the false premise that what the carriers may voluntarily do the Commission can compel them to do, its entire argument falls.

a. It is not correct to say, as charged by the Government (Mot., p. 5), that it is appellants' position that the Commission must consider distance "to the exclusion of all other factors." What appellants contend is that the determination of whether there is "prejudice" in rates and the determination of whether an acknowledged or proven prejudice is "undue" are two different inquiries and the significance of the distance factor is wholly different depending upon which inquiry is involved (J.S. pp. 14-15, esp. note 9).

b. Based on its false premise, the Government argues (Mot., pp. 5-6) that "the distance factor is not so sub-

stantial . . . [as] to compel a rate differential." Appellants do not contend that the distance factor "compels" a rate differential. Appellants contend that the Commission has no power to condemn an *existing* differential in the absence of a showing that it is improperly proportioned to the additional services rendered.

c. Again based on its false premise, the Government argues that the order should be sustained because "on the average" the distances to Corpus Christi exceed those to Galveston and Houston by less than 25 percent, which the Government terms "slight."[4] Again, the Government evades the question. The question is not whether equalization of rates in disregard of 25-percent differences in distance would be lawful. The question is: "Are the *existing* rates unlawful? The Government makes no attempt to show upon what basis such rates could be held to be unlawful.

d. The fact that the same rates apply to Galveston and Houston is no basis for sustaining the order. While the

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[4] The differences in distance (ranging up to sixty percent) cannot properly be termed "slight." They are almost exactly the same as in *Nueces County Nav. Dist.* v. *Abilene & S. Ry. Co.*, 155 I.C.C. 712 (1929), Corpus Christi's previous attempt to secure equalization of cotton rates with Galveston and Houston, in which the Commission held that Corpus Christi's distance disadvantage was "of such a substantial character as to preclude a requirement by us that it be neutralized by freight-rate adjustment." 155 I.C.C. at 715. Furthermore, it is improper to deal with such differences "on the average." We are not here dealing with group rates but with individual point-to-point rates. Obviously a 25-percent point is not "representative" of a 55-percent point when dealing with individual point-to-point rates. The Commission did not attempt to support its order by the use of any such averages.

Commission noted that there were differences between the short-line miles and the Docket No. 28300 miles (J.S., App. p. 23), it did not attach any significance to that fact but rather proceeded on the theory that whatever the mileage differences were between Corpus Christi, on the one hand, and Houston and Galveston, on the other, it had the right to ignore them to compel the carriers to follow a policy of port equalization. It is on that basis that its order must be judged.[5]

e. There is no merit to the Government's assertion that because the Commission has disregarded equivalent differences in distance in certain grain cases, it may do so here.[6] The facts in those cases were substantially differ-

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[5] Contrary to the implication in the Government's motion (p. 4), Corpus Christi is not equalized with Galveston and Houston on "other commodities" except where such equalization has been compelled by the Commission in the "grain" cases (see paragraph (e), *infra*). Also, the statement at the bottom of page 6 of the Corpus Christi motion that the class-rate distances and class rates shown in appendix D of our jurisdictional statement are erroneous is incorrect. From the origins here involved the class-rate distances and, therefore, the class rates themselves, are the same to Houston and Galveston, but such rates are higher to Corpus Christi because of the longer distances. As appendix D shows, except from the relatively unimportant origins in Oklahoma, Corpus Christi now has a more favorable relation vis-a-vis Galveston and Houston with respect to the rates on export cotton than it does with respect to the class rates prescribed by the Commission, which are a commonly employed test of lawful rate relations (J.S., note 1, p. 6). If the Commission had attempted to rationalize its order on the ground suggested by appellees, it would have had to make explanatory findings on the many unmentioned ramifications of this subject.

[6] It is significant that the Government does not attempt to defend the District Court's rationalization of these cases as being "relevant transportation conditions." (J.S., pp. 16-17)

ent from those here presented (J.S., pp. 16-18) and, in any event, such Commission decisions would have no precedential value here, for when the Commission assumes a power plainly not granted to it, no amount of interpretation by the Commission that it has such power is binding on the courts. *Texas & Pacific Ry. Co.* v. *United States*, 289 U.S. 627, 640.

## III.

Appellees do not challenge in any respect the allegations of section IV of our jurisdictional statement in which we listed six principal reasons which the District Court gave for sustaining the order, none of which were given by the Commission as a reason for entering it.

We do not contend that this issue alone requires further briefing and argument, but it certainly requires reversal of the judgment below. *Securities & Exchange Comm'n* v. *Chenery Corp.*, 318 U.S. 80, 94-95; 332 U.S. 194, 196; *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168-169; and *Labor Board* v. *Metropolitan Ins. Co.*, 380 U.S. 438, 442-444. The law is clear, the errors are obvious, and they are impliedly conceded by the silence of appellees.

## CONCLUSION

We submit that the issues raised by this appeal are of the greatest substantiality and public importance, that they are presently ripe for review and should be now resolved by this Court, and that their proper disposition requires briefing and argument on the merits. If, however, the Court does not agree, then the proper disposition of this appeal would be summary reversal for further consideration by the District Court.

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NO. 828

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

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THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,

*Appellants,*

v.

UNITED STATES OF AMERICA, ET AL.

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On Appeal from the United States District Court for the Southern District of Texas.

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## BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

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THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,

*Appellants,*

v.

UNITED STATES OF AMERICA, ET AL.

On Appeal from the United States District Court for the Southern District of Texas.

## BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

The Atchison, Topeka and Santa Fe Railway Company, et al., appellants in No. 828, submit this brief in opposition to the motion of the United States and Interstate Commerce Commission and the motion of Nueces County Navigation District No. 1 and Gulf Compress, which seek to have this Court affirm summarily the judgment of the district court below.

## Statement

The argumentative technique employed by the appellees is to ignore the issues presented in this case by constructing a rationalization for the Commission's order independent of the conflicting rationalizations offered by the Commission in its report. In essence, they contend that the differences in distance between the origin territory and the ports do not warrant or compel a difference in rates, therefore—they argue—the Commission reached the correct *result*. In this manner, the appellees seek to avoid scrutiny of several basic questions involved here concerning Section 3(1) of the Interstate Commerce Act [49 U.S.C. §3(1)] and the responsibility of administrative agencies and reviewing courts to adhere to the standards set forth in the Administrative Procedure Act [5 U.S.C. §§1001, *et seq.*] The silence of the appellees does not negate the existence of these substantial questions but, rather, constitutes an implicit concession that analysis of them requires reversal of the judgment of the district court. Moreover, the arguments that the appellees do make fail to account for the fact that the differences in distance are substantial according to the Commission's own analysis of the evidence and fail to account for the fact that the Commission's rationalization of its order was based upon the proposition that it has authority to compel the railroads to establish equal rates despite substantial differences in distance (J.S. App. 23).[1]

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[1] "J.S." and "J.S. App." refer to pages of the Jurisdictional Statement filed by appellants in No. 828.

## Argument

1. The *sine qua non* of the Commission's order is its assertion that it has authority to compel the railroads to establish equal rates to competing ports despite substantial differences in distance, which is coupled with its finding that, based upon Docket 28300 distances, Corpus Christi is from 120 to 160 miles, or from twenty to sixty percent, more distant from the origin territory than the allegedly favored ports (J.S. App. 23).[2] Whether the Commission has such unbridled discretion to compel the railroads to establish equal rates despite substantial distance differences is a question of considerable importance. This Court has considered it on prior occasions and has held that the Commission has no authority to adjust freight rates for the purpose of neutralizing natural geographic disadvantages such as those Corpus Christi has with respect to the origin territory here involved. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U.S. 42, 46 (1911); *United States* v. *Illinois Central R. Co.*, 263 U.S. 515, 524 (1924); *Texas and Pacific R. Co.* v. *United States*, 289 U.S. 627,

[2] The characterization of these differences in distance as "substantial" is not a matter of advocacy. In a prior proceeding brought by Corpus Christi to secure equalization of export cotton rates from substantially the same origin territory, the Commission found that distance differences ranging from 130 to 163 miles—almost identical with those involved here—were "of such a substantial character as to preclude" an order requiring equalization. *Nueces County Nav. Dist. No. 1* v. *Abilene & S. Ry.*, 155 I.C.C. 712, 716 (1929).

629 (1933); *State of New York* v. *United States*, 331 U.S. 284, 331-332 (1947).

2. The appellees seek to preclude analysis of the question of whether the Commission has discretion to compel the railroads to disregard substantial distance differences by relying upon the Commission's inexplicable statement that the distances here are only "slightly more" to Corpus Christi (J.S. App. 23) and, somewhat inconsistently, by relying upon the contention that if the railroads could voluntarily establish equal rates to Corpus Christi despite its geographical disadvantage, the Commission may compel them to do so under Section 3(1). This reliance is misplaced.

a) First, the appellees are unable to agree on what in the Commission's report supports its statement that distances to Corpus Christi are only "slightly more".[3] The Corpus Christi interests cite geographic, highway and so-called "weighted average" distances but concede, at page 4 of their motion, that the Commission was "evidently"

[3]The anomalous character of this statement is best illustrated by comparing it with the finding in *Nueces County Navigation Dist. No. 1* v. *Abilene & S. Ry.*, 155 I.C.C. 712, 716, that almost identical differences in distance are of "such a substantial character as to preclude" equalization. The Commission, of course, did not discuss this prior case in its report, although it involved the same commodity, the same ports and substantially the same origin points. The district court, responding to the contentions of the appellees, provided its own rationalization for the Commission's failure to explain the basis of its departure from its prior ruling. This, in itself, requires summary reversal of the district court's judgment. *Labor Board* v. *Metropolitan Ins. Co.*, 380 U.S. 438, 442-3 (1965); *Burlington Truck Line* v. *United States*, 371 U.S. 156, 168-169 (1962).

referring to rail distances. They do not state what specific rail distances the think the Commission was referring to, but they subsequently suggest that Corpus Christi is 10.1 percent more distant based upon "actual railroad mileages via circuitous routes" (p. 5). This distance comparison, however, does not appear in the Commission's report. The Government, on the other hand, suggests that the Commission might have been referring to average Docket 28300 distances. This, according to footnote 5 of the Government's motion, shows that Corpus Christi is, on the average, about twenty-five percent more distant. The Commission did not engage in this averaging process in its report; nor would it have been appropriate for the Commission to have done so, since the issue is the lawfulness of the rates from each individual point rather than from the origin territory as a whole.

b) Second, the Government's contention that there is no distinction between what the railroads may do voluntarily and what the Commission may compel them to do has no merit. *United States* v. *Illinois Central R.R.*, 263 U.S. 524 (1924), cited by the Government, refutes rather than supports its position. See also *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U.S. 541, 553 (1912) and *Boston & Maine R.R.* v. *United States*, 202 F. Supp. 830, 837 (1962), aff'md 373 U.S. 372 (1962). The reason the Government makes this erroneous contention is to seek refuge in this Court's statement in *Ayrshire Corp.* v. *United States*, 335 U.S. 573, 588 (1949), that the Commission has "broad discretion . . . to accommodate the

factors of transportation conditions, distance and competition." The *Ayrshire* case, also relied upon by the district court (J.S. App. 9-10), involved, *inter alia*, the question of the degree to which the railroads could voluntarily equalize more distant points without violating Section 3(1) of the Interstate Commerce Act. Consequently, that case has no application here since the scope of the Commission's discretion to subordinate distance to other factors, whatever it may be when the lawfulness of equalization voluntarily proposed by the railroads is in issue, has no bearing upon the lawfulness of existing rates which properly give effect to differences in distance. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U.S. 42, 46 (1911); *United States* v. *Illinois Central R. Co.*, 263 U.S. 515, 524 (1924); *Texas and Pacific R. Co.* v. *United States*, 289 U.S. 627, 629 (1933); *State of New York* v. *United States*, 331 U.S. 284, 331-332 (1947); *Alabama G. S. R. Co.* v. *United States*, 340 U.S. 216 (1951); *Baltimore & Ohio R. Co.* v. *United States*, 151 F. Supp. 258, 275 (1957), vacated on other grounds, *I. C. C.* v. *Baltimore & O. S. Co.*, 355 U.S. 175 (1957).

3. Irrespective of the appellees' diverse, *post hoc* attempts to rationalize the Commission's statement that distances are "slightly more" to Corpus Christi, the fact remains that that statement is factually inconsistent with the Commission's analysis of comparative Docket 28300 distances and logically inconsistent with its rationalization that it has authority to compel the railroads to disregard the substantial differences revealed by that analysis (J.S. App. 23). This fundamental inconsistency raises a number of important questions that the appellees have not discussed. For example, does the finding that the distances

to Corpus Christi are "slightly more" so conflict with the Commission's analysis of Docket 28300 distances and with its legal rationalization as to be arbitrary and without evidentiary support? Does this inconsistency render the Commission's report too ambiguous for adequate judicial review?[4] These are significant questions, and the failure of the appellees to designate any consistent support for the Commission's statement that distances to Corpus Christi are slight as well as the appellees' inability to suggest any coherent resolution of the basic inconsistencies in the Commission's report demonstrate, we submit, that these questions must be answered in the affirmative.

4. By employing an argumentative technique that, in essence, is a *post hoc* effort to show, independent of the reasoning of the Commission, that a proper result was reached, the following additional issues, discussed in our Jurisdictional Statement, were ignored:

a) The Commission's reliance upon prior, distinguishable proceedings without explanation of the basis therefor (J.S. 13-15);

b) The Commission's failure to explain its direct departure from a prior ruling that the differences in distance from origins involved here preclude an order requiring equalization of export cotton rates to Corpus Christi (J.S. 15-17);

c) The district court's erroneous interpretation of Section 3(1) contained in its finding that equaliza-

[4] The district court acknowledged that the report "is so imprecise in revealing just what findings it is making that the order borders dangerously on running afoul of the requirement that agencies disclose the basis of their orders" (J.S. App. 3-4). The district court resolved the imprecision by failing to take note of the fundamental inconsistencies in the report.

tion of rates on other commodities is a "relevant transportation condition" (J.S. 17);

d) The district court's reliance on *post hoc* rationalizations not found in the Commission's report (J.S. 18); and

e) The district court's error in affirming the Commission's order despite the acknowledged lack of clarity in the Commission's report (J.S. 19).

These issues are substantial, having a direct bearing on the responsibility of administrative agencies and reviewing courts to adhere to the standards set forth in the Administrative Procedure Act. We submit, quite apart from our view that the Commission reached the wrong *result*, that those standards have not been adhered to here.

## Conclusion

For the reasons stated, we ask this Court to deny the motions to affirm and to note probable jurisdiction.

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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

CITY OF GALVESTON ET AL. *v.* UNITED STATES ET AL.; and

THE ATCHISON, TOPEKA & SANTA FE RY. CO. ET AL. *v.* UNITED STATES.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS.

Nos. 827 and 828. Decided March 13, 1967.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.